Supreme Court, U.S.
FILED

(1)

961871 MAY 27 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WINFRED L. MAXWELL,

Petitioner,

vs.

WILLIAM BRATTON as Police Commissioner of the New York City Police Department, Police Lieutenant THOMAS KELLY, Police Inspector PHILIP LEE, Police Chief THOMAS GALLAGHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TED TRIEF
Counsel of Record
TRIEF & OLK
Attorneys for Petitioner
40 West 57th Street, 33rd Floor
New York, New York 10019
(212) 262-1010

NELSON M. FARBER
TED TRIEF
BARBARA OLK
Of Counsel

74 pp

QUESTIONS PRESENTED

1. Whether the police may, consistent with the Fourth Amendment, stop at manned police barricades all persons attempting to drive into a densely populated urban neighborhood which has been designated by officials to be a high-crime zone, where the stated purpose of such stops is to deny vehicular access to motorists who are unable to demonstrate to the satisfaction of a single police officer a "legitimate reason" for entering the target zone, and where the government does not post notices warning approaching motorists that they are about to encounter the manned barricades?

2. Whether a general governmental interest in stopping drive-by shootings, drug sales, and other crimes constitutes a special need justifying the use of suspicionless, barricaded stops?

3. Whether the law was clearly established in September, 1992, at the time of Petitioner's stop at a manned police barricade, that such barricaded stops violated the Fourth Amendment, for purposes of determining whether the police officials who planned and authorized such stops are entitled to qualified immunity in an action brought pursuant to 42 U.S.C. §1983?

LIST OF PARTIES AND PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES PURSUANT TO RULES 14 AND 29.6 OF THIS COURT

The parties to the judgment from which review is sought are Respondents: (1) William Bratton as Police Commissioner of the New York City Police Department, (2) Police Lieutenant Thomas Kelly, (3) Police Inspector Philip Lee, and (4) Police Chief Thomas Gallagher. A list of all other parties to the proceeding are as follows: (1) The City of New York, (2) The New York City Police Department, (3) Police Officer Timothy Morley, (4) Police Officer Angel De Jesus, (5) Police Officer Monserrate Badillo, (6) Police Officer David Arroyo, (7) Police Sergeant Daniel Gonin, (8) Police Sergeant Richard Van Leuven, (9) Police Detective George Vasta. This petition is not filed on behalf of one or more corporations, nor are there any parent or subsidiary companies to be listed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES PURSUANT TO RULES 14 AND 29.6 OF THIS COURT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION OF THE COURT	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. THE STOP, ASSAULT, ARREST AND PROSECUTION OF PETITIONER BY NEW YORK CITY POLICE OFFICERS	3
B. THE WATSON AVENUE SPECIAL OPERATION AND THE SPECIAL OPERATION'S USE OF MANNED POLICE BARRICADES TO BLOCK VEHICULAR ACCESS TO A DESIGNATED "FROZEN ZONE"	4
1. The Frozen Zone	4
2. The Subjective Determination of the Officer at the Stop	5
C. PROCEEDINGS BELOW	7
REASONS FOR GRANTING THE PETITION	13

	Page
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT	13
A. The Standards in General	13
B. These Standards Render the Special Operation Stops Unconstitutional	16
C. The Very Different Stops in *Martinez-Fuerte* and *Sitz*	21
D. The Law Was Clearly Established	23
II. THIS CASE RAISES IMPORTANT ISSUES	25
CONCLUSION	28
APPENDIX	
Opinion of the United States Court of Appeals for the Second Circuit, Dated December 17, 1996	A-1
Opinion and Order of the United States District Court for the Southern District of New York, Dated April 25, 1995	A-17
Judgment/Mandate of the United States Court of Appeals for the Second Circuit, Issued as Mandate March 6, 1997	A-35
Order of the United States Court of Appeals for the Second Circuit, Dated February 26, 1997	A-37

TABLE OF AUTHORITIES

Cases:	Page
Albright v. Oliver, 510 U.S. 266 (1994)	21
Almeida-Sanchez v. United States, 413 U.S. 266 (1973)	16
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	3
Arizonans for Official English v. Arizona, ___ U.S. ___, 117 S.Ct. 1055 (1997)	8
Brown v. Texas, 443 U.S. 47 (1979)	9, 10, 16, 17, 19, 26, 27
Camara v. Municipal Court, 387 U.S. 523 (1967)	14
Carroll v. United States, 267 U.S. 132 (1925)	14, 20, 22, 24
Chandler v. Miller, ___ U.S. ___, 117 S.Ct. 1295 (1997)	13-15, 17-18
City of Los Angeles v. Heller, 475 U.S. 796 (1986) (per curiam)	10
City of Los Angeles v. Lyons, 461 U.S. 95 (1983)	8
Delaware v. Prouse, 440 U.S. 648 (1979)	13, 15, 16, 20, 23
Galberth v. United States, 590 A.2d 990 (D.C. App. 1991)	17, 25-27
Kolender v. Lawson, 461 U.S. 352 (1983)	16
Maryland v. Wilson, ___ U.S.___, 117 S.Ct. 882 (1997)	20
Maxwell v. City of New York, 102 F.3d 664 (2d Cir. 1996)	*passim*

Cases: **Page**

Merrett v. Moore, 58 F.3d 1547 (11th Cir. 1995), *reh'g en banc den.*, 77 F.3d 1304 (11th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 58 (1996) 25, 26

Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) 10-14, 16, 21, 23-24, 26

Monell v. Department of Social Services, 436 U.S. 658 (1978) 8, 9

National Treasury Employees Union v. Von Raab 489 U.S. 656 (1989) 14

New Jersey v. T.L.O., 469 U.S. 325 (1985) 18

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 19

Olmstead v. United States, 277 U.S. 438 (1928) 19

People v. Evans, 162 Misc.2d 517, 620 N.Y.S.2d 26 (App. Term 1st Dept. 1994) 25, 26

Shankle v. Texas City, 885 F. Supp. 996 (N.D. Tex. 1995) 25-27

Siegert v. Gilley, 500 U.S. 226 (1991) 10

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 14, 17

State v. Damask, 936 S. W.2d 565 (Mo. banc 1996). 25-27

Swint v. Chambers County Comm'n, 514 U.S. 35 (1995) 2

Terry v. Ohio, 392 U.S. 1 (1968) 15, 17, 18

United States v. Albarado, 495 F.2d 799 (2d Cir. 1974) 21

Cases: **Page**

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 15-16

United States v. Lanier, ___ U.S. ___, 117 S.Ct. 1219 (1997) 24-25

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 10-14, 16, 21-24, 26

United States v. Ortiz, 422 U.S. 891 (1975) 15

United States v. Ramirez-Gonzalez, 87 F.3d 712 (5th Cir. 1996) 25

Vernonia School District 47J v. Acton, ___ U.S.___, 115 S.Ct. 2386 (1995) 13, 14

Whalen v. Roe, 429 U.S. 589 (1977) 19

Whren v. United States, ___ U.S. ___, 116 S.Ct. 1769 (1996) 14

Other Authorities:

Anthony Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974) 12

N.Y. Exec. Law §20 et seq. (McKinney 1993), "State and Local Natural and Man-made Disaster Preparedness Act" 25

U.S. Const. amend. IV ..... *passim*

28 U.S.C. §1254 2

28 U.S.C. §1291 2

28 U.S.C. §1331 2

28 U.S.C. §1343 2

42 U.S.C. §1983 ..... 2-3, 7

42 U.S.C. §1985(3) 2, 7

42 U.S.C. §1986 ..... 2, 7

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WINFRED L. MAXWELL,

Petitioner,

vs.

WILLIAM BRATTON as Police Commissioner of the New York City Police Department, Police Lieutenant THOMAS KELLY, Police Inspector PHILIP LEE, Police Chief THOMAS GALLAGHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Winfred L. Maxwell respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is published at 102 F.3d 664 (2d Cir. 1996), and is set forth in the Appendix at A-1. The opinion of the District Court is unpublished and is provided at A-17. The judgment/mandate is provided at A-35. The order of the

Second Circuit denying rehearing is unpublished and is provided at A-37.

JURISDICTION OF THIS COURT

The jurisdiction of the District Court in this federal civil rights action brought by Petitioner pursuant to 42 U.S.C. §§1983, 1985(3) and 1986 was invoked under 28 U.S.C. §§1331 and 1343. The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §1291 by Respondents pursuant to the collateral order doctrine, following the District Court's denial of summary judgment based upon qualified immunity with respect to the ninth count of the amended complaint. *See Swint v. Chambers County Comm'n*, 514 U.S. 35 (1995).

The judgment of the Court of Appeals for the Second Circuit in favor of Respondents which reversed the District Court and dismissed the ninth count of the amended complaint was entered on December 17, 1996 (A-35) based upon the opinion of the Second Circuit of that date (A-1). A timely petition for rehearing and suggestion for rehearing in banc was denied by an order entered on February 26, 1997 (A-37). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress . . . .

STATEMENT OF THE CASE

A. THE STOP, ASSAULT, ARREST AND PROSECUTION OF PETITIONER BY NEW YORK CITY POLICE OFFICERS

Petitioner Winfred L. Maxwell ("Maxwell") is a retired New York City Police Officer who served on the force for over seventeen years. In the early evening of September 19, 1992, Maxwell sought to drive to his daughter's house located in the Soundview neighborhood of the South Bronx. He was accompanied by a female passenger who lived on the same block as his daughter. When Maxwell and his passenger reached the corner of his daughter's block, he encountered, without prior warning, a police barricade manned by Police Officer Timothy Morley ("Morley"). Morley was then twenty-five years old and had been on the force for about a year. Officer Morley is white; retired Officer Maxwell is black.

Morley demanded to see Maxwell's license and registration. When Maxwell responded by asking if he had done anything wrong, Morley cursed at him and reiterated his demand that Maxwell produce identification.[1] Maxwell informed Morley that he was a retired police officer, and that he

---

[1] The facts concerning the encounter between Maxwell and Morley, while sharply disputed, must be considered in the light most favorable to Maxwell as the non-moving party defending a summary judgment motion. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

kept his license and registration in a pouch that also held his registered handgun. Morley directed Maxwell to open the pouch anyway. When Maxwell opened the pouch Morley observed Maxwell's firearm and reacted by drawing his service revolver on Maxwell and radioing for back-up.

Morley ordered Maxwell out of his car. As backup officers arrived, Morley flipped Maxwell to the ground, and Morley and the six back-up officers beat Maxwell as he lay prone. One of the backup officers, Sergeant Van Leuven, called Maxwell a "nigger dirtbag." Maxwell was detained until arraignment the next day and was charged with Assault in the Second Degree, Resisting Arrest, Disorderly Conduct and Harassment. He ultimately was acquitted of all charges.

B. THE WATSON AVENUE SPECIAL OPERATION AND THE SPECIAL OPERATION'S USE OF MANNED POLICE BARRICADES TO BLOCK VEHICULAR ACCESS TO A DESIGNATED "FROZEN ZONE"

1. The Frozen Zone

The barricade Maxwell encountered was a component of a New York City Police Department program known as the Watson Special Operation ("the Special Operation"), which was implemented within the 43rd Police Precinct in the Bronx between August and October 1992. Developed with the goal of combatting various crime problems, including drug trafficking, robberies and random drive-by-shootings[2], the Special Operation initially was in effect three days per week on a random basis for approximately seven hours per day, between approximately 1600 hours and 2300 hours. In September, 1992, the Special Operation was extended on selected days to 0200 hours, because drug dealers had adjusted their activities to times when the Special Operation was not functioning. The

---

[2] No regulatory objective, such as vehicle or traffic safety, was cited by Respondents as a basis for implementing the Special Operation.

Special Operation was concluded on October 16, 1992, allegedly because of the drain of manpower from other precincts.

The Special Operation was comprised of numerous police resources and assets. In addition to the manned barricades, the Special Operation "consist[ed] of saturation, high visibility uniformed foot patrol, acting in conjunction with Aviation, Mounted, Emergency Services and Narcotics Division Personnel[,]" and officers placed on rooftops.

Manned police barricades were erected in an eight square block area ("the frozen zone"). All persons seeking to enter the frozen zone by automobile were stopped. There was no entry by vehicle to the frozen zone without encountering a barricade. 102 F.3d at 669 (Oakes, J. dissenting). It is undisputed that markings were not posted on the roads leading up to the barricades. Thus, unless a motorist had actual knowledge of a particular manned barricade he or she would not learn of the stop until only seconds beforehand.

2. The Subjective Determination of the Officer at the Stop

It is undisputed that neither probable cause nor reasonable suspicion of criminal activity was required to stop motorists at the barricades or to deny access past the barricades into the frozen zone after the initial stop. The Memorandum implementing the Special Operation dated July 30, 1992 ("the July 30th Memorandum") merely stated that "barricades will be set up on side streets feeding into Watson Avenue in order to discourage drive-up purchasers from patronizing local dealers. Area residents will be allowed to enter the target area . . . ." 102 F.3d at 669 (Oakes, J. dissenting). The July 30th Memorandum did not set forth which persons other than area residents would be granted permission into the frozen zone. A Memorandum dated August 24, 1992 ("the August 24th Memorandum") from the Commander of the 43rd Police Precinct stated:

> Supervisors will inform Officers manning barriers that area residents will be allowed to pass through

> the barrier, as well as delivery trucks. Those individuals *who do not have a legitimate reason* to enter will be instructed to utilize other routes . . . . [emphasis added]

There were no other written directives on procedures for operating the barricades other than the July 30th and August 24th Memoranda. Police Lieutenant Kelly, the Special Operation architect, testified at his deposition that he orally gave examples at roll call of nonresidents who would be allowed entry into the frozen zone -- specifically, persons dropping off small children, neighborhood churchgoers, store owners, and delivery drivers. Kelly, however, could not think of any other examples communicated to the rank and file. Kelly conceded that what is or is not a "legitimate reason" under the August 24th Memorandum depended on the field officer's subjective evaluation. He further testified that motorists could not enter the frozen zone unless they "could come up with a reasonable excuse" as to what they were going to do in the area. Then Bronx Borough Commander Thomas Gallagher, who approved the Special Operation testified "it's basically a subjective determination" of the officer's, as to which persons would be permitted to enter.

The understanding of the officers assigned to the Special Operation confirmed the total subjectivity of the officer's determination concerning the decision to permit entry into the frozen zone. Richard Van Leuven, who called Maxwell a "nigger dirtbag," was one of the sergeants supervising the Special Operation. He testified that a motorist would be denied access past the barricade "[i]f he started giving a cock and bull story," adding "it just comes down to the officer's preference." According to Van Leuven, the barricade's purpose was "to keep people you don't want in, out."

Daniel Gonin, another sergeant supervising the Special Operation, testified that the officer would have to use "discretion . . . to size up the situation[,]" while motorists seeking entry "would have to convince the officer it was a legitimate visit . . . ." Sergeant Gonin, who imparted operating instructions to

Officer Morley -- the officer who stopped Mr. Maxwell -- testified that he did not receive guidance from Kelly in the use of discretion, and that in turn, he did not offer such guidance to officers under his supervision.

The Special Operation drew from a random pool of police officers, including rookies such as Morley, to perform the unquestionably delicate and difficult task of checkpoint operation. Morley testified that he was not instructed how to respond if a motorist stated that he or she did not live in the zone, but was visiting a friend or relative. "I *guess* I'd let you through" (emphasis added) said Morley when asked how he would react to a motorist who agreed to provide his license and registration and friend's address within the zone. "I don't know. I don't know the answer to that question" responded Morley when the hypothetical was varied to include the motorist's refusal to provide the friend's name.

C. PROCEEDINGS BELOW

Following his acquittal of charges brought in connection with his stop at the barricade, Maxwell commenced suit in the United States District Court for the Southern District of New York pursuant to 42 U.S.C. §§1983, 1985(3) and 1986 and corresponding state law claims. Maxwell's amended complaint challenges the constitutionality of the initial stop at the manned police barricade, as well as the post-stop physical assault, arrest and prosecution; only the initial stop's constitutionality is presently before this Court. Maxwell's federal and state law claims for excessive force, false arrest and malicious prosecution are pending on the District Court's suspense calendar.

The amended complaint seeks money damages and injunctive and declaratory relief, alleging that the barricaded stop of Maxwell violated his right to be free from unlawful searches and seizures under the Fourth Amendment, his right to intrastate travel as protected by the Ninth and Fourteenth Amendments, and his right to freedom of association guaranteed by the First Amendment. The money damages claims concerning the constitutionality of the initial stop are brought against:

The City of New York ("the City") and The New York City Police Department ("the NYPD") under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), then Police Commissioner William Bratton, Police Lieutenant Thomas Kelly, then Police Inspector Philip Lee, then Bronx Police Borough Commander Thomas Gallagher, and Officer Morley. The individual Respondents are officials who planned and/or approved of the Special Operation. Officer Morley stopped Officer Maxwell at a barricade. The claims for injunctive and declaratory relief were brought against The City, the NYPD, Bratton and Kelly.

Following a period of discovery, cross-summary judgment motions were made with respect to Maxwell's money damages and equitable claims concerning the constitutionality of his initial stop at the barricade. Maxwell's other claims were not the subject of the dispositive motion practice. In an unpublished opinion dated April 25, 1995 (A-17), the District Court: 1) denied Maxwell's summary judgment motion in its entirety; 2) dismissed Maxwell's claims for injunctive and declaratory relief for lack of standing; 3) dismissed Maxwell's money damages claims based on the right to travel and the right to freedom of association; and 4) denied the moving defendants (the City, the NYPD, Bratton, Kelly, Lee, Gallagher, and Morley) summary judgment on Maxwell's Fourth Amendment money damages claim (the amended complaint's ninth count) -- the only claim presently before this Court.[3]

---

[3] Maxwell's money damages claim based upon the constitutionality of his stop at the barricade presents a live case and controversy under Article III, §2, of the Constitution. The fact that the District Court has determined that he lacks standing to press his claims for declaratory and injunctive relief does not nullify his claim for monetary relief arising out of the same factual circumstances. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 112-113 (1983), this Court expressly ruled that a litigant can sue for money damages seeking redress for past wrongs even though the plaintiff cannot demonstrate a real or immediate threat justifying prospective equitable relief. *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055 (1997), is not to the contrary since Maxwell, unlike the plaintiff in *Arizonans*, has always sought both monetary and equitable relief.

Assuming, without deciding, that Maxwell had been "seized" at the barricade within the meaning of the Fourth Amendment, the District Court held that such seizure's reasonableness was to be evaluated under the three-pronged balancing test enunciated in *Brown v. Texas*, 443 U.S. 47, 50-51 (1979), for determining the reasonableness of seizures less intrusive than traditional arrest. The District Court defined the test, as applied specifically to the Special Operation stops, to require a balancing of:

> . . . the gravity of the drive-by shootings, drug sales and other crimes alleged to require the checkpoint, the effectiveness of the checkpoint in curtailing these crimes, and the level of intrusion on a driver's privacy caused by the checkpoint.

The District Court concluded that application of the *Brown* criteria would have to await a more fully developed factual record, thereby rendering summary judgment inappropriate, as "the facts currently presented relating to the second inquiry in the three-part test -- the effectiveness of the checkpoints -- are incomplete and in dispute." However, the District Court went on to provide a further basis for denying summary judgment, stating "if plaintiff's version of the facts proves true, and the officers did not provide adequate instructions on how to operate the checkpoints, qualified immunity would not protect them."

Bratton, Kelly, Lee and Gallagher ("the police officials") took an interlocutory appeal to the United States Court of Appeals for the Second Circuit from the District Court's denial of summary judgment based upon qualified immunity. A divided Second Circuit panel reversed the District Court and granted the four police officials qualified immunity.[4]

---

[4] Only the denial of qualified immunity on Maxwell's Fourth Amendment claim was before the Court of Appeals. However, as the majority in the Second Circuit found the Special Operation stops to be constitutional, the appeal effectively disposed of Maxwell's "*Monell*" claim against the City and the NYPD in which he alleges that such stops violated the Fourth

(Footnote continued)

The majority properly ruled that the police officials would be entitled to qualified immunity "if either the checkpoint in question did not violate clearly established federal rights . . . or it was objectively reasonable for defendants to believe their conduct was lawful . . . . [cites omitted]" 102 F.3d at 667. Applying this Court's ruling in *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), the majority found the "threshold inquiry" of the qualified immunity analysis was "whether the plaintiff has alleged a constitutional violation at all." 102 F.3d at 667.

The majority first ruled that a roadblock or checkpoint is a seizure within the meaning of the Fourth Amendment. *Id.* Like the District Court, the majority found that the "reasonableness" of such seizure was to be gauged under the three-pronged *Brown* test. As for the first prong, the majority found that "the checkpoints in question served an important public concern in attempting to deter drive-by shootings that were, or were reasonably perceived to have been, connected with widespread drive-up drug purchases." *Id.* As for the second prong, the majority concluded "at the time of implementation, the checkpoints were reasonably viewed as an effective mechanism to deter criminal behavior in the barricaded area[,]" adding "in order to satisfy the effectiveness prong, a checkpoint need only be one reasonable method of deterring the prohibited conduct; it need not be the most effective measure." *Id.* Without citing to the record, the majority also found that "checkpoints similar to the one here had been effectively used in the past by the New York City Police." *Id.*

As for the third prong, the majority, relying principally upon the checkpoint-stop cases in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) and *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), found the intended level of intrusion to motorists to be "minimal." *Id.* The majority ruled that the stops at the Special Operation barricades were not unduly intrusive because they were made without

---

Amendment. *See City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (*per curiam*).

suspicion of criminal wrongdoing. Rather, citing *Martinez-Fuerte* and *Sitz* for the broad-stroked proposition that "[p]olice roadblocks need not be based on reasonable suspicion of particular drivers[,]" 102 F.3d at 668, the majority further held that the stops were minimally intrusive insofar as they were meant to be brief and aimed solely at determining the motorist's connection with the neighborhood, and insofar as they did not impinge at all upon the privacy of persons who did not wish to drive into the cordoned-off area. 102 F.3d at 667.

The majority also ruled that as all motorists were to be stopped at the barricades, "there was little concern that the stop would generate fear and surprise[,]" as "where [a] motorist can see that other vehicles are being stopped and can see visible signs of the officer's authority, there is little likelihood of fright or annoyance[.]" *Id.* In this respect, the majority failed to see any discernable difference between the Special Operation stops and the stops in *Sitz* and *Martinez-Fuerte*. *Id.*

The majority rejected Maxwell's argument that the barricaded stops violated the Fourth Amendment because of the excessive discretion invested in officers to deny motorists entry into the frozen zone. The majority was satisfied that the officers were obligated to allow all residents and commercial vehicles, as well as churchgoers and persons dropping off small children to enter. 102 F.3d at 668. While acknowledging that "discretion was to govern the inevitable myriad of other circumstances that might arise," the majority stated that it knew of "no way to catalogue each of those circumstances in advance and to provide a litmus test to resolve them." *Id.* "We believe that the instructions were as detailed as was reasonably possible and, therefore, were constitutionally adequate[,]" concluded the majority. *Id.*

Judge Oakes dissented. Finding "that entrance to the frozen zone was left to the arbitrary determination of officers in the field with no meaningful written standards of how to exercise their discretion[,]" 102 F.3d at 670, he argued that the Special Operation left "in James Otis's phrase,'the liberty of every

man in the hands of every petty officer.'" 102 F.3d at 671. The unfettered discretion afforded Special Operation officers created the incongruous possibility that members of the law-abiding public, even federal appellate judges, could be refused entry past the barricades while would-be assassins could be let in:

> Thus, law abiding citizens -- you or I -- could be turned away at the checkpoint officer's discretion, while even passengers in a car fitting a description of drive-by shooters might be allowed to pass if the driver said he was visiting a friend in the area and could provide his friend's correct address. 102 F.3d at 669.

Quoting from Anthony Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 416 (1974), the dissent further objected to the tyranny of the unlimited police discretion to search and seize as follows:

> whether you and I get arrested and subjected to full-scale body search or are sent upon our respective ways with a pink multiform and a disapproving cluck . . . depends upon the state of the digestion of any officer who stops us -- or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin. 102 F.3d at 668, n. 1.

Disagreeing with the majority's reliance upon *Sitz* and *Martinez-Fuerte*, the dissent asserted that while "[t]he majority characterizes this as a stop by police 'at a barricaded vehicle checkpoint[,]' . . . [t]he 'checkpoint' here is quite different from the sobriety checkpoint upheld in [*Sitz*], or the alien checkpoint initially upheld in [*Martinez-Fuerte*]." 102 F.3d at 668-69.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

A. The Standards in General

The majority opinion misconstrues *Martinez-Fuerte* and *Sitz* as well as other decisions of this Court in asserting with unlimited sweep that "[p]olice roadblocks need not be based on reasonable suspicion of particular drivers." 102 F.3d at 668. A police barricade surely is not a talisman which makes suspicionless roadblock stops constitutional *per se*. Such stops, like all other searches and seizures implicating the Fourth Amendment, are analyzed on a case-by-case basis under the Amendment's "reasonableness" standard. *See Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979).

The mere fact that all motorists seeking access into the Special Operation frozen zone were stopped and questioned by field officers, at least one of whom, Morley, was young and extremely inexperienced, did not assure the reasonableness of such stops; rather, the blanket stops only guaranteed that all drivers and their passengers, the overwhelming number of whom surely were law-abiding, were subjected to a governmental intrusion. To borrow a phrase from the Chief Justice, the majority opinion below "elevates the adage misery loves company to a novel role in Fourth Amendment jurisprudence[,]" *id.* at 664 (Rehnquist, J. dissenting), and undervalues a core value of the Amendment which is to secure the populace against unrestrained suspicionless searches and seizures common in colonial times under the notorious "general warrants," *see Vernonia School Dist. 47J v. Acton*, ___ U.S. ___, 115 S.Ct. 2386, 2398-99 (O'Connor, J. dissenting).

"To be reasonable under the Fourth Amendment, a search [or seizure] ordinarily must be based on individualized suspicion of wrongdoing." *Chandler v. Miller*, ___ U.S. ___, 117 S.Ct. 1295, 1301 (1997). This Court has long held that the Fourth Amendment's preference for suspicion-based search

and seizure applies equally to vehicular stops. In the landmark case *Carroll v. United States*, 267 U.S. 132, 154 (1925), this Court ruled that the Fourth Amendment protects the right to "free passage on highways unless a government officer has probable cause to believe that the motorist [is breaking the law]." This "simple yet powerful intuition," *Vernonia School Dist.*, 115 S.Ct. at 2398 (1995) (O'Connor, J. dissenting), is as much of a mainstay of American life as the automobile itself, and is a freedom generally taken for granted. *See also*, *Whren v. United States*, ___ U.S. ___, 116 S.Ct. 1769 (1996).

In limited circumstances -- but only where special needs "beyond the normal need for law enforcement" have been demonstrated -- courts have permitted suspicionless searches and seizures. *Chandler*, 117 S.Ct. at 1301; *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 619 (1989). In *Skinner*, 489 U.S. at 624, this Court explained the narrowness of this exception as follows:

> In limited circumstances, where the privacy interests implicated by the search are minimal and where an important governmental interest furthered by the intrusion would be placed in jeopardy by requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.

See also, *Vernonia School Dist.*, 115 S.Ct. at 2391 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989). Examples of "special needs" which have justified suspicionless searches and seizures, in addition to those presented in *Martinez-Fuerte*, and *Sitz*, include (a) the drug testing of railroad employees involved in accidents (*Skinner*), (b) drug testing of student athletes (*Vernonia*), (c) area-wide warrants to ensure uniform compliance with health and safety inspections (*Camara v. Municipal Court*, 387 U.S. 523 (1967)), and (d) "where the risk to public safety is substantial and real" and the "searches are calibrated to the risk" such as searches at airports and entrances to courts and other public buildings (*dicta* in *Chandler*, 117 S.Ct. at 1305).

However, whether the government has alleged a *bona fide* "special need" sufficient to negate the requirement of suspicion is subject to close judicial scrutiny. *See Chandler*, 117 S.Ct. at 1304 (sufficient "special need" not found to support suspicionless drug testing of candidates for state office where the government "offered no reason why ordinary law enforcement methods would not suffice to apprehend . . . addicted [candidates] . . .").

Even where a "special need" is established, the Fourth Amendment's reasonableness requirement is not obviated; rather, safeguards alternative to individual suspicion suffice to protect the public from the "grave danger of abuse of discretion." *Delaware v. Prouse*, 440 U.S. at 654, 662. As this Court stated in *Prouse*, 440 U.S. at 654-55:

> [i]n those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.

In *Prouse*, such countervailing safeguards were absent. *Prouse* concerned random, suspicionless license and registration checks performed by the police and made without any formal standards guiding field officers as to which cars to pull over. *Id.* at 650. Citing to *Terry v. Ohio*, 392 U.S. 1, 22 (1968), the Court found that "[t]o insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches" (internal quotes and citation omitted). *Id.* at 661. *See also*, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (suspicionless roving border patrols violate Fourth Amendment, notwithstanding minimal nature of intrusion); *United States v. Ortiz*, 422 U.S. 891 (1975) (probable cause required to conduct a search of cars stopped at border checkpoints);

Almeida-Sanchez v. United States, 413 U.S. 266, 270 (1973) (warrant supported by probable cause required for search of vehicles in vicinity of border, as suspicionless search by border patrol "embodied precisely the evil" . . . resulting from uncircumscribed "discretion of the official in the field"). *Cf. Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (statute requiring persons stopped based upon reasonable suspicion to provide "credible and reliable identification" held facially void for vagueness under the Due Process Clause as the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute); *Brown v. Texas*, (suspicionless pedestrian stop in high drug problem area violated the Fourth Amendment).

On two occasions, *Martinez-Fuerte* and *Sitz*, this Court has upheld the constitutionality of suspicionless vehicular stops, based upon the presence of "special needs" coupled with the existence of neutral, objective standards which ensured that the searches and seizures would be minimally intrusive. As recognized by the dissent below and as analyzed in subsection (C) of this petition, the Special Operation stops were very different than the stops upheld in these two cases. In both cases, however, this Court reaffirmed the impermissibility of such stops where unconstrained discretion existed. In discussing *Brignoni-Ponce*, this Court in *Martinez-Fuerte*, 428 U.S. at 559, recognized the "grave danger that such unreviewable discretion would be abused by some officers in the field." This Court similarly noted in *Sitz*, 496 U.S. at 454, in discussing *Prouse*, 440 U.S. at 661, that "[w]e observed that the random stops involved the 'kind of standardless and unconstrained discretion [which] is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.'"

B. These Standards Render the Special Operation Stops Unconstitutional

It is evident that the Special Operation's barricaded stops were unconstitutional under the three-part *Brown* test. Under

the first prong of the test -- the gravity of the public concern served by the checkpoint -- it cannot be disputed that society has a vital interest in preventing the array of crimes cited by the police officials for implementing the Special Operation, ranging from burglaries, drug dealing and drive-by shootings. However, to justify a suspicionless search and seizure, the issue is not whether the interest is vital; the issue, as identified in *Skinner* and most recently in *Chandler*, is whether the interest presents "special needs, beyond the normal need for law enforcement." The high crime problem presented in the Bronx's Soundview neighborhood is endemic to many densely populated urban areas throughout the Country and presents a traditional law enforcement problem. *See Galberth v. United States*, 590 A.2d 990 (D.C. App. 1991). The majority failed to consider whether the Special Operation's goals could have been equally served by the use of the saturated police presence without the necessity of the barricades. The majority's failure to even undertake a "special needs" analysis is contrary to *Skinner* and *Chandler*, and potentially establishes a predicate for subjecting millions of law-abiding Americans to suspicionless searches and seizures of their papers and personal effects merely because they are travelling through high crime zones.

Even assuming *arguendo* that "special needs" existed so as to justify the initial barricaded stops, the Special Operation stops at issue granted officers unbridled discretion to deny vehicular access into the target zone and thereby ran afoul of the second and third *Brown* factors. The majority's overly deferential analysis of the second prong -- the degree to which the barricaded stops effectively addressed the crime concerns in the target zone -- was fundamentally flawed insofar as it failed to evaluate whether ordinary law enforcement methods would have advanced the governmental interests in crime prevention, *Chandler*, 117 S.Ct. at 1304. In this regard, neither the Second Circuit nor the Respondents in the Court below proffered an explanation why, pursuant to *Terry v. Ohio*, all motorists were not allowed to pass the barricades unless reasonable suspicion developed during the course of the stop to believe that a driver or the car's occupants were engaging

in crime. During the course of such a *Terry*-stop, suspicion either 1) would blossom into probable cause in which case an arrest presumably would be made, or, by contrast, 2) would be dispelled, in which instance the car would be allowed into the target zone. Neither the Second Circuit nor Respondents in the Court below enunciated why employing traditional reasonable suspicion/probable cause analysis after the time of the initial stop would have been less protective of the Soundview community than allowing the officers to decide who would enter the neighborhood based upon either "inarticulate hunches," *Terry*, 392 U.S. at 22, or prejudice.[5]

Moreover, as the Court held in *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985), *quoting*, *Terry v. Ohio*, *supra*, 392 U.S. at 20, "Determining the reasonableness of any search [or seizure] involves a twofold inquiry: first one must consider 'whether the action was justified at its inception'; second, one must determine whether the search [or seizure] as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.'" Here, the authority of the officers to turn motorists away based upon "inarticulable hunches" or personal animus certainly was not reasonably related in scope to the crime prevention and deterrence goals of the Special Operation, with respect to the second element of the test enunciated in *Terry* and *T.L.O.* Indeed, in "special needs" cases where search and seizures are made without particularized suspicion, the first and second elements of this test appear to be inexorably intertwined as the suspicionless intrusion can only be considered reasonable at its inception if sufficient curbs are placed on

---

[5] Maxwell also disagrees with the District Court's view that a further statistical analysis of whether the Special Operation reduced crime is necessary or even helpful in determining whether the stops at issue were effective in preventing or deterring crime in the target zone. Maxwell submits that the proper analysis is not a post-hoc assessment of whether the stops worked -- rather, in keeping with *Chandler*, the proper analysis focuses on whether traditional law enforcement methods could have equally advanced the governmental interest.

official discretion to ensure that such intrusion remains reasonable in scope.

As for the third *Brown* factor -- the severity of the intrusion upon individual liberty -- the standardless Special Operation stops unduly burdened the liberties of drivers and passengers. As there were no posted warnings, motorists did not learn about the barricaded stops until only moments beforehand. The stops here occurred on side-streets leading to residential blocks. A law abiding driver who is stopped at a checkpoint on a highway, such as an immigration or sobriety checkpoint, in all likelihood will not believe that he or she is the specific target of police activity, as distinct from other motorists. By contrast, a law abiding driver approaching the block of a friend or relative who is stopped by police may rationally believe that he or she is the specific target of investigation. This is precisely what happened in this case, where Maxwell asked Morley if he had done anything wrong, and Morley cursed at Maxwell in response. On a highway, the driver is likely to have an opportunity to observe visible signs of the officer's authority before being stopped; the same is not true where a driver turns onto a side-street. Places like highways, airports, and courthouses are highly regulated environments, and persons in such settings may be subjected to blanket suspicionless seizures and searches without believing that they are being singled out. The same cannot be said when the stops are made on neighborhood side-streets.

In a similar vein, persons at a border checkpoint or in an airport will generally accept that they will have to tell an official their destinations. Persons about to enter the block of a family member, friend, or even a lover, by contrast, may feel rightfully justified in saying, "Officer, that is none of your business." As observed by Justice Brandeis, "the right to be let alone is the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J. dissenting). *See also Whalen v. Roe*, 429 U.S. 589, 599 (1977) (recognizing constitutional right to privacy in disclosing personal matters); *Nixon v. Administrator of General Services*, 433 U.S. 425, 427 (1977) (same). A person who refuses to

answer the officer's personal questions, presumably, will not have established a "legitimate" reason for entering the target zone. Alternatively, a motorist forced to comply in order to gain access to the frozen zone may depart feeling angered, embarrassed, humiliated and even fearful.

Even if the motorist accedes to the questioning, he or she still may be refused entry into the frozen zone at the officer's unbridled discretion. The statement of the majority below that the discretion permitted Special Operation officers was permissible because "we know of no way to catalogue each of those circumstances in advance and to provide a litmus test to resolve them[,]" is breathtaking for its implicit assumption -- that the government has the absolute authority in the first instance to prevent a law abiding citizen or resident from travelling the public roads to visit friends, loved ones, or merchants, or just to pass through. Yet, in the words of Justice Kennedy, "[l]iberty comes not from officials by grace but from the Constitution by right." *Maryland v. Wilson*, ___ U.S.___,117 S.Ct. 882, 891 (1997) (Kennedy, J. dissenting). The majority opinion below is in direct conflict with this Court's pronouncements in *Carroll* concerning the Fourth Amendment's right to free travel. This Court has never held, and no federal appellate court has ever held, that the government can consistent with the Fourth Amendment prohibit persons from freely travelling public roads in the absence of a short term emergency (such as a traffic accident or fire), or a formal declaration of an emergency. The majority opinion below eviscerates rights previously taken for granted and profoundly intrudes upon individual liberty.

The Special Operation stops are not rendered less obtrusive because motorists who were denied vehicular access into the target zone could walk to their destinations. Many drivers "find a greater sense of security . . . in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel." *Prouse*, 440 U.S. at 662. Such security concerns are certainly elevated by persons travelling into a neighborhood that is a high crime zone. Additionally, the unbridled discretion of the Special Operation officers left them

free to direct the elderly, the infirm, and people with heavy packages or groceries from entering the zone by car. Moreover, having to walk to one's destination in inclement weather certainly is more than minimally intrusive.

The majority below in attempting to minimize the seriousness of the intrusion upon individual liberty suggests in *dicta* that turning a vehicle away at a barricade is not a "seizure" because the motorist can still travel everywhere except his chosen destination. Case law, however, is to the contrary. In *Martinez-Fuerte*, most motorists actually knew of the permanent immigration checkpoints placed on major highways in California and Texas or could have easily obtained such knowledge. 428 U.S. at 559. Nevertheless, the Court found the border checkpoint stops to be "seizures," thereby implicitly rejecting the notion that motorists were not seized merely because they could have driven elsewhere. *See also United States v. Albarado*, 495 F.2d 799, 806, 806-07 (2d Cir. 1974) ("unintrusive magnetometer walk-through" at airport held to be a "search," as "[to] make one choose between flying to one's destination and exercising one's constitutional right appears to us . . . in many situations, a form of coercion, however subtle"). *Cf. Albright v. Oliver*, 510 U.S. 266, 278-80 (1994) (Ginsberg, J. concurring) (pending trial an accused person may be constructively "seized" by the government within the meaning of the Fourth Amendment, even though he has been released from custody).

In sum, the Special Operation amounted to a general warrant with none of the countervailing protections that would minimize the incursion into personal liberties. The decision of the Second Circuit should be reversed.

C. The Very Different Stops in Martinez-Fuerte and Sitz

The Special Operation stops in the case at bar were very different than those found permissible in *Martinez-Fuerte* and *Sitz*. *Martinez-Fuerte* involved consolidated appeals over permanent immigration checkpoints located in the proximity of borders in California and Texas. The California checkpoint

was comprised of the following features: 1) large signs located one mile and one-quarter of a mile away alerted motorists to stop, 2) a government agent performed a visible screening of the stopped or near-stopped vehicles, 3) most vehicles were allowed to resume their travels without any questioning of their occupants, and 4) a small number of vehicles were directed to a secondary inspection area, where occupants were questioned about their citizenship and immigration status. *Martinez-Fuerte*, 428 U.S. at 545-47. The Texas program was essentially the same, except all motorists were stopped for brief inquiry. *Id.* at 549-50.

This Court balanced the legitimate governmental border patrol interests against the relatively minimal intrusion upon vehicular occupants, and upheld the use of the checkpoints at issue. Specifically, concerning the minimal nature of the intrusion, the Court found, *inter alia*: 1) motorists were not genuinely taken by surprise as they had or could have obtained prior knowledge of the permanent checkpoint's existence, 2) the regulated manner in which the checkpoints operated lessened fear and surprise, and 3) the procedures involved gave checkpoint officers only limited discretion.

Significantly, the immigration officers operating the checkpoints at issue in *Martinez-Fuerte* had absolutely no discretion to prevent a vehicle from travelling ahead once the stop failed to yield particularized suspicion of illegality. The Court therefore concluded that the stop intruded only to a "limited extent on motorists' right to 'free passage without interruption,'" [under] *Carroll v. United States*. Here, however, Special Operation officers had ***unlimited discretion*** to restrain vehicular access into the frozen zone even absent particularized suspicion. While the checkpoint officers in *Martinez-Fuerte* were provided guidelines and regulations as to how to further the narrowly defined objective of controlling the Nation's border, Special Operation checkpoint officers received no written guidance, and were told little more than to let motorists with a "legitimate reason" enter the neighborhood.

Sitz involved a Michigan sobriety checkpoint program comprised of the following elements: 1) all vehicles passing through the checkpoints were stopped and their drivers briefly examined for signs of intoxication, 2) where no signs of intoxication were found, vehicles would continue unimpeded, and 3) those motorists who showed signs of intoxication were directed to a secondary location for license and registration checks and sobriety testing, if necessary. *Sitz*, 496 U.S. at 447.

As in *Martinez-Fuerte* and unlike in the case at bar, the checkpoint officers in *Sitz* did not have discretion to pick and choose which persons would be allowed to proceed past the roadblocks. The *Sitz* Court emphasized the lack of discretion in the individual officers as compared to the unbridled discretion in *Prouse*. In *Sitz*, even a driver directed to a secondary location was allowed to proceed if officers did not develop articulable suspicion to believe that the motorist was impaired. Further, unlike in *Martinez-Fuerte* and *Sitz*, the stops here occurred on side-streets in the heart of a residential neighborhood rather than on a highway and thus, by their very nature, were far more invasive. Thus, there is nothing in these cases which would legitimize the stops at issue here; to the contrary, the unconstrained discretion granted the Special Operation officers is akin to that cited as impermissible in those cases.

D. The Law Was Clearly Established

This Court is asked to rule that the law was clearly established at the time of the Special Operation that the barricaded stops at issue violated the Fourth Amendment, for purposes of vitiating the Respondents' qualified immunity. The Court below, having found the stops to be constitutional, never reached this issue. However, as the issue of whether the law was clearly established at the time in question is naturally subsidiary to the issue of whether the stops were constitutional, this Court is asked to resolve the matter rather than remand the issue back to the Court of Appeals.

The cases discussed above established, before the time of the Special Operation, that the government may not prevent free travel on public roads unless the government has particularized suspicion to believe that a driver or passenger has committed a crime (*Carroll*), or pursuant to a "special need" in which a brief suspicionless detention is permissible *subject to* strict curbs being placed on the discretion of the officer in the field (*Martinez-Fuerte*; *Sitz*). These authorities provided the Respondent police officials with ample notice in 1992 that a program of blanket suspicionless stops in which field officers had unlimited discretion to prevent free vehicular travel on public roads after the time of the initial stop violated the Fourth Amendment.

The fact that there was not a case from either this Court or from the Second Circuit holding such stops to be unconstitutional at the time of the Special Operation does not lead to a finding here that the law was not clearly established. As recently stated by this Court in *United States v. Lanier*, ___ U.S. ___, 117 S.Ct. 1219, 1227-28 (1997):

> . . . In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary (citation omitted). But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful (internal quotation and citation omitted) . . . . There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune for damages or criminal liability (internal quotation and citations omitted).

Under *Lanier*'s standard of "obvious clarity," the Respondents were put on notice that the Special Operation stops violated the Fourth Amendment.

II. THIS CASE RAISES IMPORTANT ISSUES

The majority opinion below is the first by a federal appellate court to hold that the police may stop law abiding citizens and residents from travelling the public streets, even in the absence of a short term emergency or formal declaration of natural or manmade disaster.[6] The Special Operation's frozen zone is antithetical to the American psyche and evokes images of societies very different from our own. The fact that "the majority is essentially giving the New York City Police Department a judicial blank check to conduct similar 'special operations'," 102 F.3d at 671 (Oakes, J. dissenting), creates an important issue that warrants this Court's intervention to protect core American values that are safeguarded through the Fourth Amendment's requirement that searches and seizures be "reasonable."

This case also presents this Court with an important and timely opportunity to clarify the broader question of whether blanket suspicionless vehicular stops are permissible under the Fourth Amendment for purposes of crime prevention and, if so, what the parameters of such stops are. The case law demonstrates that there has been a proliferation of the use of such stops in recent years,[7] although in only one reported case

---

[6] *See, e.g.*, New York's "State and Local Natural and Man-made Disaster Preparedness Act," found at N.Y.Exec. Law §20 et seq. (McKinney 1993).

[7] *See United States v. Ramirez-Gonzalez*, 87 F.3d 712 (5th Cir. 1996); *Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995), *reh'g en banc den.* 77 F.3d 1304 (11th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 58 (1996); *Shankle v. Texas City*, 885 F.Supp. 996 (N.D. Tex. 1995); *State v. Damask*, 936 S.W.2d 565 (Mo. banc 1996); *Galberth v. United States*, 590 A.2d 990 (D.C. App. 1991); *People v. Evans*, 162 Misc.2d 517, 620 N.Y.S.2d 26 (App. Term 1st Dept. 1994).

other than the one at bar were officers authorized to deny law-abiding motorists access into a frozen zone.[8]

This Court's two checkpoint cases, *Martinez-Fuerte* and *Sitz*, provide at best abstract theoretical guidance as to the constitutionality of blanket suspicionless vehicular stops implemented for crime prevention, as those cases involved far different factual contexts. Not surprisingly, courts have reached different conclusions in applying the three-pronged *Brown* balancing test to crime prevention stops. In *Galberth v. United States*, the District of Columbia Court of Appeals ruled that the police did not advance a legitimate governmental interest in establishing a roadblock "designed to promote general law enforcement purposes[,]" 590 A.2d at 998, under the first prong of the *Brown* test, and suppressed an illegal firearm seized by police after the driver had been stopped at a roadblock. The United States District Court in *Shankle v. Texas City* reached a similar conclusion in finding that "[i]f detentions are allowed without individualized suspicion to deter crime, this could permit preventive detentions in virtually every case." 885 F.Supp. at 1004.[9] By contrast, the Missouri Supreme Court is in accord with the *Maxwell* majority that a governmental interest in crime prevention is sufficient to support blanket suspicionless vehicular stops. *State v. Damask*, 936 S.W.2d at 572.

Courts also have diverged on their application of the "effectiveness" prong of the *Brown* test. In *Galberth* (590 A.2d at 999), *Shankle* (885 F.Supp. at 1003) and *Evans* (620 N.Y.S.2d at 27) the courts found that the law enforcement objectives could be met through a substantial police presence

---

[8] *Shankle v. Texas City.*

[9] *See also, Merrett v. Moore*, 77 F.3d at 1307 (Barkett, J., dissenting from denial of suggestion for rehearing en banc, as one of the roadblock's stated purposes of intercepting illegal drugs runs afoul of the Fourth Amendment due to "the historical concern with protecting citizens from wholesale governmental searches and seizures in the absence of probable cause or reasonable suspicion").

without the use of roadblocks. By contrast, the majority opinion below and the *Damask* Court, 936 S.W.2d at 571-72 simply deferred to the law enforcement judgment of police officials, without assessing whether less intrusive traditional law enforcement methods would equally serve crime prevention interests.

Courts also have disagreed over whether blanket suspicionless law enforcement stops are overly intrusive under *Brown*'s third prong. The *Galberth* Court found that they were (590 A.2d at 990) as did the *Shankle* Court, which held that the stops by the police designed to prevent vehicular access into a frozen zone similar to the one at bar were overly intrusive -- at least where a warrant had not been secured authorizing the roadblocks (885 F.Supp. at 1002-04). By contrast, the *Damask* Court, like the majority below, found the roadblocks to be minimally intrusive. 936 S.W.2d at 575. As the divergence of authority indicates, clarification by this Court is needed to elucidate when the police may conduct blanket suspicionless stops for crime prevention purposes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

TED TRIEF
Counsel of Record
TRIEF & OLK
Attorneys for Petitioner
40 West 57th Street, 33rd Floor
New York, New York 10019
(212) 262-1010

NELSON M. FARBER
TED TRIEF
BARBARA OLK
Of Counsel

Date: May 22, 1997
New York, New York

APPENDIX

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 676—August Term, 1995

(Argued: December 11, 1995 Decided: December 17, 1996)

Docket No. 95-7464

WINFRED L. MAXWELL,

Plaintiff-Appellee,

—v.—

CITY OF NEW YORK; THE NEW YORK CITY POLICE DEPARTMENT; TIMOTHY MORLEY, Police Officer; ANGEL DEJESUS, Police Officer; MONSERRATE BADILLO, Police Officer; DAVIE ARROYO, Police Officer; DANIEL GONIN, Police Sergeant; RICHARD VAN LEUVAN, Police Sergeant; and GEORGE VASTA, Police Detective,

Defendants,

WILLIAM BRATTON, as Police Commissioner of the New York City Police Department; THOMAS KELLY, Police Lieutenant; PHILIP LEE, Police Inspector; and THOMAS GALLAGHER, Police Chief,

Defendants-Appellants.

Before:

OAKES, WINTER, and WALKER,
Circuit Judges.

Interlocutory appeal from an order of the United States District Court for the Southern District of New York (Michael B. Mukasey, *Judge*) denying defendants' motion for summary judgment on the ground of qualified immunity. We hold that the establishment of a vehicle checkpoint did not violate appellant's Fourth Amendment rights and reverse.

Judge Oakes dissents in a separate opinion.

ELAINE ROTHENBERG-WITCOFF, Assistant Corporation Counsel, New York, New York (Paul A. Crotty, Corporation Counsel and Larry A. Sonnenshein, of counsel), *for Defendants-Appellants.*

TED E. TRIEF, Trief & Olk, New York, New York (Nelson M. Farber, of counsel), *for Plaintiff-Appellee.*

WINTER, *Circuit Judge*:

This appeal involves the constitutionality of a vehicle checkpoint. Winfred Maxwell, a retired New York City police officer, brought this action against the city of New

York and various police officials and officers for alleged violations of his constitutional and civil rights, under 42 U.S.C. §§ 1983, 1985(3), and 1986, and for corresponding violations of state law. Maxwell's twenty-eight count amended complaint alleges, *inter alia*, that in going to visit his daughter, he was stopped by police at a barricaded vehicle checkpoint. He claims that the existence of the checkpoint and resultant stop violated his Fourth Amendment right to be free from unreasonable searches and seizures. Maxwell further alleges that various police officers at the checkpoint used excessive force against him and illegally arrested, detained, and prosecuted him.

Appellants, Police Commissioner William Bratton, Lieutenant Thomas Kelly, Inspector Philip Lee, and Chief Thomas Gallagher, were responsible only for planning and ordering the establishment of the checkpoint. They were denied qualified immunity by Judge Mukasey on Maxwell's claim for monetary damages for alleged Fourth Amendment violations in ordering the checkpoint. We hold that establishing the particular vehicle checkpoint without more did not violate Maxwell's Fourth Amendment rights and reverse.

BACKGROUND

During the spring and summer of 1992, street crime, including four drive-by shootings, escalated in the Soundview neighborhood of the Bronx. In response, the 43rd precinct instituted the so-called Watson Avenue Special Operation. This involved a temporary vehicular checkpoint in an eight square-block narcotics-ridden area where most of the drive-by shootings had taken place. The checkpoint was to be active three days a week

on a random basis and for approximately six hours a day, primarily in the evening hours. When the checkpoint was in operation, officers manning the barricade were to stop every vehicle seeking to enter the area in order to ascertain the driver's connection to the neighborhood. Drivers who approached the checkpoint were to be allowed to avoid questioning by driving around the area or by parking their cars and entering the area on foot. Area residents and commercial vehicles were to be allowed into the neighborhood. Officers manning the barricades were verbally instructed that they could also allow cars dropping off small children or visiting the local church to enter the area. Other than that, vehicles were not permitted beyond the barricades. The operation was in effect for six weeks, between August 26 and October 10, 1992.

In the early evening of September 19, 1992, Maxwell sought to drive to his daughter's house, which was in the barricaded area.[1] At the checkpoint Maxwell was directed by Officer Timothy Morley to stop the vehicle and to produce his driver's license and registration. Maxwell alleges that he informed Morley that he was a retired police officer and that the pouch in which he kept his license and registration also contained a registered handgun. He then reached for the pouch and opened it. Upon observing the firearm, Morley drew his service revolver and ordered Maxwell out of the vehicle. Maxwell alleges that he complied but that Morley nevertheless flipped him to the ground and made "unlawful

---

1 Maxwell claims that, prior to arriving at the checkpoint, he observed no posted markings alerting him that he was approaching such a barricade and had no opportunity to avoid being stopped and questioned. Whether a failure to allow drivers to avoid the checkpoint might violate a driver's rights is not before us because Maxwell wanted to enter the area by car.

physical contact" with him. A squad car of back-up officers soon arrived. Maxwell alleges that the officers unlawfully beat him, kicked him, punched him, and stepped on his neck. Thereafter, the officers handcuffed Maxwell and took him into custody. Maxwell claims that at this point he turned to one of the officers and said, "Sarge, look in the bag, I'm a retired police officer." To which the officer allegedly replied, "I don't care. As far as I'm concerned you're a Nigger Dirtbag." Maxwell was then taken by the officers to a station house where he was charged with Assault in the Second Degree, Resisting Arrest, Disorderly Conduct, and Harassment. He was detained until his arraignment the following day after which he was released. A jury acquitted Maxwell on all charges.

Maxwell filed the instant action alleging violations of his civil and constitutional rights as well as various state law claims. The district court granted the defendants' motion for partial summary judgment with respect to various claims but declined to dismiss Maxwell's Fourth Amendment claim for monetary damages for being stopped—apart from being arrested and beaten—at the checkpoint. Maxwell's excessive force, illegal detention, and certain other claims were not the subject of the summary judgment motion and remain pending.

The district court also denied appellants' motion that the complaint be dismissed as to Bratton, Kelly, Lee, and Gallagher on the ground of qualified immunity. They were of course involved only in planning and ordering the checkpoint and not in the arrest and alleged beating of Maxwell. In denying the motion, Judge Mukasey stated that "Because [Maxwell's claim for monetary damages based on alleged Fourth Amendment violations] must proceed to trial, it cannot be determined at

this stage whether plaintiff suffered any violation of his constitutional rights. Further, if plaintiff's version of the facts proves true, and the officers did not provide adequate instructions on how to operate the checkpoints, qualified immunity will not protect them." Therefore, the court held that summary judgment was inappropriate and that the issue of qualified immunity must proceed to trial. This interlocutory appeal followed.

DISCUSSION

Only the district court's denial of the qualified immunity defense as to the four appellants is before us. We review a district court's denial of summary judgment *de novo*. *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993).

The district court denied qualified immunity in the belief that genuine questions of material fact exist as to whether the vehicle checkpoint itself—in contrast to the alleged misconduct of the officers manning the checkpoint—violated Maxwell's constitutional rights. Appellants are entitled to qualified immunity if either the checkpoint in question did not violate clearly established federal rights, *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), or it was objectively reasonable for defendants to believe their conduct was lawful, *see Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The threshold inquiry is, of course, whether the plaintiff has alleged a constitutional violation at all. *See Siegert v. Gilley*, 500 U.S. 226, 232 (1991); *Blue v. Koren*, 72 F.3d 1075 (2d Cir. 1995).

In *Michigan Department of State Police v. Sitz*, the Supreme Court held that a Fourth Amendment " 'seizure'

occurs when a vehicle is stopped at a checkpoint." 496 U.S. 444, 450 (1990); *see also People v. Scott*, 63 N.Y.2d 518, 524, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984) ("There is . . . no question that a roadblock or checkpoint is a seizure within the meaning of the Fourth Amendment.") The reasonableness of a seizure at a vehicle checkpoint depends upon a balancing of (i) the gravity of the public concerns served by the checkpoint; (ii) the degree to which the checkpoint effectively addresses those concerns; and (iii) the severity of the intrusion upon individual liberty. *Sitz*, 496 U.S. at 448-49 (citing *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)). We conclude that, as planned, the Special Operation passed constitutional muster.

First, the checkpoints in question served an important public concern in attempting to deter drive-by shootings that were, or were reasonably perceived to have been, connected with widespread drive-up drug purchases. Second, at the time of implementation, the checkpoints were reasonably viewed as an effective mechanism to deter criminal behavior in the barricaded area. Indeed, checkpoints similar to the one here had been effectively used in the past by the New York City Police. *See Sitz*, 496 U.S. at 453-54 (in order to satisfy the effectiveness prong, a checkpoint need only be one reasonable method of deterring the prohibited conduct; it need not be the most effective measure).

Third, the intended level of intrusion to motorists was minimal. No vehicle was to be stopped or its operation questioned unless entry into the cordoned-off area was desired. For those seeking entry, the stop was meant to be brief and was aimed solely at ascertaining the motorists' connection to the neighborhood. In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the

Supreme Court held that a checkpoint aimed at interdicting the flow of illegal aliens which involved "only a brief detention of travelers during which all that [was] required of the vehicle's occupants [was] a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States" was not sufficiently intrusive so as to violate the Fourth Amendment. *Id.* at 558 (internal quotation marks omitted). Here, as in *Martinez-Fuerte*, the request for evidence of a legitimate reason to enter the barricaded area was not significantly intrusive. Moreover, because the plan here was to stop all motorists seeking entry, there was little concern that the stop would generate "fear and surprise." *Sitz*, 496 U.S. at 452-53; *Martinez-Fuerte*, 428 U.S. at 558 (where motorist can see that other vehicles are being stopped and can see visible signs of the officers' authority, there is less likelihood of fright or annoyance).

Maxwell next argues that even if stopping those who wanted to enter the Soundview area was valid, the plan empowered the officers with excessive discretion to turn people away and was therefore sufficiently intrusive to constitute a Fourth Amendment violation. In that regard, Maxwell cites the testimony of one sergeant that the decision to permit or forbid an individual vehicle's entry "just comes down to the officer's preference." However, the instructions given allowed all residents and commercial vehicles to enter, as well as persons dropping off little children or visiting the church. It is true that discretion was to govern the inevitable myriad of other circumstances that might arise, but we know of no way to catalogue each of those circumstances in advance and to provide a litmus test to resolve them. We believe that the

instructions were as detailed as was reasonably possible and, therefore, were constitutionally adequate.[2]

We emphasize the discretion afforded went only to the decision to permit or deny vehicular entry into the area, not to the detention of persons in the vehicles. Police roadblocks need not be based on reasonable suspicion of particular drivers, *see Martinez-Fuerte*, 428 U.S. at 536, 559-60, but the detention of particular motorists beyond the initial stop "may require satisfaction of an individualized suspicion standard." *Sitz*, 496 U.S. at 451; *see also Martinez-Fuerte*, 428 U.S. at 566-67 ("The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop.") Thus, once the initial stop has been conducted, the decision to further detain a motorist must be based on particularized reasonable suspicion. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968); *United States v. Sokolow*, 490 U.S. 1, 7 (1988). Our decision does not, therefore, affect Maxwell's claims regarding events after the initial stop.

---

[2] We also note that simply turning away a vehicle when no legitimate reason for entry is given may not constitute a search or a seizure for Fourth Amendment purposes. In order for there to have been a "search," "the police must have physically intruded into 'a constitutionally protected area.' " *See* 1 LaFave, *Search & Seizure* § 2.1(a), at 302-03 (2d ed. 1987). Refusing entrance does not intrude into any such area. Similarly, a "seizure" requires that an officer restrict the liberty of an individual such that a reasonable person would not believe that he was free to leave. *Id.* (citing *United States v. Medenhall*, 446 U.S. 544 (1980)). In *Sheppard v. Beerman*, 18 F.3d 147 (2d Cir.), *cert. denied*, 115 S. Ct. 73 (1994), we held that no Fourth Amendment "seizure" took place when a fired court employee was escorted from the courthouse. We reasoned that because the plaintiff was free to go anywhere in the world, except the courthouse, he had not been "seized." *Id.* at 153. Here, the plan was that motorists who were denied entry for lack of any legitimate reason to go into the area were free to go anywhere else.

We conclude that summary judgment should have been granted as to the four appellants and reverse.

OAKES, *Senior Circuit Judge*, dissenting:

I find it surprising that the majority holds—particularly at the summary judgment level—that the police operation here in question does not implicate the Fourth Amendment. I have long agreed with the thesis put forth by Professor Anthony Amsterdam in his Holmes Lectures at the University of Minnesota Law School[1] that "the Fourth Amendment requires all police search and seizure activity to be regulated by legal directives that confine police discretion within reasonable bounds."[2] Accordingly, I dissent.

The majority characterizes this as a stop by police "at a barricaded vehicle checkpoint." But the "checkpoint" here is quite different from the sobriety checkpoint upheld in *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990), or the alien checkpoint initially upheld in *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 3024, 49 L. Ed. 2d 1116 (1976). While the district court and the majority here may ultimately be upheld in evaluating the scheme in question under the three-pronged balancing

---

[1] Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349 (1974) (criticizing Court decisions holding, in effect, that "whether you and I get arrested and subjected to full-scale body search or are sent upon our respective ways with a pink multiform and a disapproving cluck . . . depends upon the state of the digestion of any officer who stops us—or, more likely, upon our obsequiousness, the price of our automobiles, the formality of our dress, the shortness of our hair or the color of our skin.") *Id.* at 416.

[2] *Id.*

test enunciated in *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979) (gravity of crimes alleged to require checkpoint, effectiveness of checkpoint in curtailing crimes, and level of intrusion on drivers' privacy caused by checkpoint), appropriate balancing and other analysis requires a more specific account of what this procedure involved. The Operation in question functioned only between August and October, 1992, and was known as the "Watson Avenue Special Operation" in the Bronx's 43rd Police Precinct. It was developed with the goal of combatting, in a specific eight-square block area, various crime problems including drug trafficking, robberies, and random drive-by shootings. The Operation occurred three days per week on a random basis for approximately seven hours a day between approximately 4 o'clock in the afternoon and 11 o'clock at night, until September 23, 1992. It was then extended until October 10, and on selected days ran as late as 2 a.m., because drug dealers had adjusted their activities to avoid coinciding with the Operation. It involved police barricades which were erected in a "frozen zone" between Watson Avenue and Westchester Avenue, including the side streets from Stratford Street to Elder Street, and including also the side streets Manor, Ward, and Boynton between Stratford and Elder. All motorists seeking access into the frozen zone encountered the manned police barricades, and while appellants' brief asserts, and the district court found, that drivers who wished to avoid any police interrogation could drive around the area blocked by the barriers, there was no access point enabling a driver to enter the frozen zone without first being stopped by a barricade. The plaintiff alleges that he, a former New York City police officer, was seeking to visit his daughter who

lived within the zone, and he was accompanied by a passenger who lived within the zone. So, let it be very clear that what we are talking about is a cordoned-off area—to be sure, a high-crime area as well—that anyone wishing to enter had to be permitted to pass through by the police officers on duty. Additionally, since markings were not posted on the roads leading up to the checkpoints, motorists had no actual knowledge of the particular checkpoint until approaching the barricades.

What were the rules by which this Operation was set up? The July 30 memorandum by Police Lieutenant Kelly, the apparent architect of the Operation, provided that "barriers will be set up on side streets feeding into Watson Avenue in order to discourage drive-up purchasers from patronizing local dealers. Area residents will be allowed to enter the target area . . . ." There were no written standards explaining which persons could and could not enter the frozen zone other than that memorandum and a memorandum of August 24, 1994, from the 43rd Precinct Commander DeRienzo to detail supervisors. That latter memo advised: "Supervisors will inform Officers manning barriers that area residents will be allowed to pass through the area, as well as delivery trucks. Those individuals who do not have a legitimate reason to enter will be instructed to utilize other routes . . . ." Needless to say, what was or was not a "legitimate reason" depended upon the field officer's subjective evaluation. This was conceded by Kelly himself, who also conceded that a motorist could be denied access even if the officer lacked probable cause or reasonable suspicion to believe that a vehicle's occupants were engaged in crime; in other words, motorists could not enter the frozen zone unless they "could come up with a reasonable excuse" as to what they were going to

do in the area. Thus, law abiding citizens—you or I—could be turned away at the checkpoint officer's discretion, while even passengers in a car fitting a description of drive-by shooters might be allowed to pass if the driver said he was visiting a friend in the area and could provide his friend's correct address. On the positive side, a delivery truck, a car full of children, a vehicle driven by a local store owner, or a car dropping off visitors to a local church might be allowed to pass through the barricade even if the driver lacked adequate documentary proof that he lived in the neighborhood. These, at least, were examples given at rollcall by Kelly of non-residents who would be allowed vehicular entry into the frozen zone. Sergeants were instructed that the barricade had to be manned and "if . . . the officers assigned had a question, they would handle it." The Bronx Borough Commander testified that "it's basically a subjective determination made by the officer as to which persons would be let in." A supervising sergeant testified that a motorist would be denied access "if he started giving a cock-and-bull story," and added that, "[i]t just comes down to the officer's preference." The purpose of the barricade was, as he said, "to keep people you don't want in, out." Another supervising sergeant testified that the checkpoint officer would have to use "discretion . . . to size up the situation" while the motorist seeking entry "would have to convince the officer it was a legitimate visit." Indeed, the sergeant who gave operating instructions to the young, inexperienced police officer who stopped the plaintiff-appellee in this case testified that he had not received guidance from architect Kelly in the use of discretion, and, in turn, the sergeant did not offer such guidance to the officers under his supervision. The arresting officer himself testified

that he was not instructed how to reply if a motorist stated that he or she did not live in the zone but was visiting a friend or relative. He said he guessed he would let such a person through if the motorist agreed to provide his license and registration and his friend's address within the zone, but he didn't know the answer to the question whether he would let the person through if the motorist refused to provide the friend or relative's name.

The district court, in denying summary judgment on the plaintiff's ninth claim seeking monetary damages for the alleged violation of his Fourth Amendment rights, found that "the facts as currently presented relating to the second [*Brown v. Texas*] inquiry in this three-part test—the effectiveness of the checkpoints—are incomplete and in dispute," thereby holding that the cross-motions for summary judgment should be denied. While the Supreme Court in *Sitz*, 496 U.S. at 454, 110 S. Ct. at 2487, made it clear that an in-depth statistical examination of a checkpoint's "effectiveness" is not warranted, there still must be some means beyond subjective evaluations by neighborhood residents of measuring whether the checkpoint reasonably advanced its stated purpose. While I agree with Judge Mukasey that only after trial could a factual determination properly be made and that portion of the test correctly be applied, and indeed until the threshold question of whether a "seizure" actually took place is resolved, it would be impossible to determine whether the frozen zone here could pass constitutional muster.

However, I agree with plaintiff-appellee that entrance to the frozen zone was left to the arbitrary determination of officers in the field with no meaningful written standards of how to exercise their discretion: the "legitimate reason to enter" mentioned in the August 24 memoran-

dum is another way of saying that the individual officer had total discretion. And it is this unfettered discretion that makes the majority's resolution of the case, in my view, totally unsound. I say this because it seems to me that the Fourth Amendment is—or, in any event, should be—about controlling such discretion. This is a point I have tried to make in several opinions, the first for the court in a border stop case, *United States v. Barbera*, 514 F.2d 294 (2d Cir. 1975), as well as in dissent in an airport search case, *United States v. Vasquez*, 612 F.2d 1338, 1352 (2d Cir. 1979), and in concurrence in another airport search case, *United States v. Place*, 660 F.2d 44, 53 (2d Cir. 1981), *aff'd* 462 U.S. 696 (1983).[3] I have also made the point in other contexts that involve the "exigent circumstances" exception in *United States v. Cattouse*, 846 F.2d 144, 148 (2d Cir. 1988) (dissent); *United States v. Martino*, 664 F.2d 860, 878 (2d Cir. 1981) (concurrence) ("To the individual law enforcement officer, the circumstances for a warrantless search and seizure always appear exigent," and bus stop searches in Buffalo, *United States v. Glover*, 957 F.2d 1004, 1015 (2d Cir. 1992) (dissent). What I am concerned about is the taking of an "atomistic" approach to the Fourth Amendment as opposed to a "regulatory" approach. Amsterdam, *supra* n.1, at 438. In effect, this leaves, in James Otis's phrase, "the liberty of every man in the hands of every petty officer." *See* Legal Papers of John Adams, 168 (1965). I do not think that the Fourth Amendment is simply a "collection of protections of atomistic spheres of interest of individual citizens," Amsterdam, *supra* n.1, at 367, but, rather, that it should be treated as "a regulation of governmental conduct." *Id.* In other words, I think that when the Fourth Amendment

---

[3] Reference here should be had to Judge George Pratt's dissent in *United States v. Hooper*, 935 F.2d 484, 499 (2d Cir. 1991).

speaks of "[t]he right of the people," it is not talking about simply the personal rights of isolated individuals but may well be speaking of "the people" as in "We, the People." The true purpose of the Amendment is to control the police when police techniques are susceptible to making unwarranted intrusions on the person being interrogated, investigated, stopped, or whatever. To my mind, the decision today goes a long way toward putting the stamp of judicial approval on overly-discretionary police practices. Unfortunately, it does so unnecessarily because here the factual record was, in a very capable district judge's view, insufficiently developed to permit coming to sound conclusions in several respects. In this sense, the majority is essentially giving the New York City Police Department a judicial blank check to conduct similar "special operations."

720—12-19-96 • USCA—80004 FY90
RECORD PRESS, INC., 157 Chambers St., N.Y. 10007 (212) 619-4949

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILFRED L. MAXWELL,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, WILLIAM BRATTON AS POLICE COMMISSIONER OF THE NEW YORK CITY POLICE DEPARTMENT, POLICE LIEUTENANT THOMAS KELLY, POLICE INSPECTOR PHILIP LEE, POLICE CHIEF THOMAS GALLAGHER, POLICE OFFICER TIMOTHY MORLEY, POLICE OFFICER ANGEL DE JESUS, POLICE OFFICER MONSERRATE BADILLO, POLICE OFFICER DAVIE ARROYO, POLICE SERGEANT DANIEL GONIN, POLICE SERGEANT RICHARD VAN LEUVEN, AND POLICE DETECTIVE GEORGE VASTA,

Defendants.

93 Civ. 5834 (MBM)
OPINION AND ORDER

APPEARANCES:

NELSON M. FARBER, ESQ.
TED TRIEF, ESQ.
Trief & Olk
(Attorneys for Plaintiff)
40 West 57th Street
New York, NY 10019
(212) 262-1010

PAUL A. CROTTY, ESQ.
Corporation Counsel of the City of New York
JONATHAN S. BECKER, ESQ.
DANIEL J. STRUCK, ESQ.
Assistant Corporation Counsel
(Attorneys for Defendants)
100 Church Street, Room 314A
New York, NY 10007
(212) 788-1280

MICHAEL B. MUKASEY, U.S.D.J.

Plaintiff, Wilfred L. Maxwell, a retired police officer, sues the City of New York, the New York City Police Department ("NYPD"), Police Commissioner William Bratton, Lieutenant Thomas Kelly, Inspector Philip Lee, Chief Thomas Gallagher, and several police officers who were assigned at the time in question to the 43rd Precinct in the Bronx, for alleged violations of his civil rights, pursuant to 42 U.S.C. §§ 1983, 1985(3) and 1986, and for alleged violations of state law. This suit stems from Maxwell's encounter with officers at an automobile checkpoint that was set up to counteract drive-by shootings in the Bronx, and what plaintiff claims was racially discriminatory conduct by the officers. As relief for his constitutional claims, plaintiff seeks on this motion, which involves only 11 of his 28 claims, an injunction barring such checkpoints and a declaration that his constitutional rights were violated. He seeks also monetary damages against several of the named defendants. Both plaintiff and defendants have moved for summary judgment on plaintiff's first 11 claims, pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, plaintiff's motion is denied, and defendants' motion is granted on the first eight claims because plaintiff lacks standing to seek injunctive and declaratory relief. Defendants' motion is granted also on claims Ten and Eleven, but is denied as to claim Nine. Plaintiff's claims Twelve through Twenty-Eight, alleging federal civil rights violations and various state law claims, are not at issue in this motion.

I.

The following facts are based on affidavits, declarations, depositions, and other documentary material. On May 3, 1992, a car drove past the corner of Watson and Ward Avenues in the Soundview section of the Bronx, and passengers armed with automatic weapons opened fire, killing one pedestrian and wounding seven others. (Kelly Decl. ¶ 4) On May 27, 1992, police arrested three heavily armed people in a car whom they believed were on their way to commit a drive-by shooting in the same area. (*Id.* at ¶ 5) Less than one month

later, a drive-by shooting at the corner of Manor and Watson Avenues claimed the life of one person, and critically wounded two others. On July 18, 1992, drive-by shooters killed another person near Wheeler Avenue. The neighborhood where these shootings occurred was plagued also by drug dealing and other crimes. From May through July 1992, police complaint reports recorded more than 80 robberies, 30 grand larcenies, 35 burglaries, 55 assaults, 100 drug offenses, and a handful of other serious crimes in the Watson Avenue neighborhood. (Defs. Ex. C)

In response to this "epidemic of serious criminal conduct" (Kelly Decl. ¶ 9), members of the neighborhood Community Council urged police officials to do something about the alleged increase in crime, and the outbreak of drive-by shootings. (Lebron Decl. ¶ 4; C. Green Decl. ¶ 4; G. Green Decl. ¶ 4; Mesisca Decl. ¶ 5; Kelly Dep. at 15) In July 1992, Lieutenant Thomas Kelly, an officer at the 43rd Precinct in the Bronx, began to develop a plan for a special operation to stem the neighborhood violence. (Kelly Decl. ¶ 10) Kelly's original plan, drawn up in consultation with his superior, Deputy Inspector Charles De Rienzo, involved a 12-square-block area. After meeting with De Rienzo and Inspector Philip Lee, Kelly scaled down the plan to cover an eight-square-block area running east to west between Watson and Westchester Avenues, from Stratford Avenue to Elder Avenue. (Kelly Decl. ¶ 12) On July 30, 1992, Kelly drafted a memorandum to his commanding officer outlining the plan. The neighborhood covered by the plan, Kelly wrote, had "witnessed an increased robbery rate and random drive by shootings." (Defs. Ex. D) Both to fight the robberies and to "reclaim" the area for community residents, Kelly proposed setting up temporary street barricades to prevent traffic, other than from "area residents and commercial vehicles," from entering. (*Id.*) Inspector Philip Lee, the commanding officer, approved the plan because of the high incidence of drug activity, robberies, and drive-by shootings. Lee hoped that over time "the basis of the relationship between dealer and buyer -- dependability of supply in terms of place and time of availability -- will break

down and both will abandon the area." (*Id.*) Kelly called the plan the Watson Avenue Special operations.

On August 13, 1992, the stated purpose of the plan was to "reduce drug trafficking and most importantly, eliminate drive by shootings." (Pls. Ex. I) On August 24, 1992, the stated primary purpose of the operation was to "prevent drive by shootings." (Pls. Ex. H.) In this August 24 memorandum, Kelly expressed hope that the "high visibility" and "saturation foot patrol" used in the operation would reduce the high level of drug activity, "street robberies," and drive-by shootings. (*Id.*)

Kelly testified at his deposition that he thought police officers posted at the barricades would stop all vehicles trying to pass into the neighborhood. All drivers would be asked to show their licenses. If the address on the license did not match an address inside the barricade, the officer would request other documentary proof that the driver lived in the area, such as a telephone or Con Edison bill. (Kelly Dep. at 31) However, even if a driver failed to produce such proof, the officer would have discretion to let the vehicle pass if the driver provided a "reasonable explanation" for traveling into the area, or if the passengers in the car did not fit a profile of a drive-by shooter. Thus, a delivery truck, a car full of children, a vehicle driven by a local store owner, or a car dropping off visitors to the Green Pastures Church might be allowed to pass through the barricade even if the driver lacked adequate documentary proof that he lived in the neighborhood. (Kelly Dep. at 34-42) Even passengers in a car fitting a description of drive-by shooters might be allowed to pass if the driver said he was visiting a friend in the area, and could provide his friend's correct address. (*Id.* at 45) Drivers who wished to avoid the police interrogation could drive around the area blocked by the barriers, or park their cars outside the barriers, and proceed on foot. (Kelly Decl. ¶ 19)

Although these instructions on how to exercise discretion to let vehicles pass were allegedly provided orally to the officers who manned the barricades, Kelly never put them in

writing. (Kelly Dep. at 42; Gonin Dep. at 14; Morley Dep. at 141) Chief Thomas Gallagher, who approved the plan, stated that he knew of no effort to make the officers at the barricades aware of proper procedures. (Gallagher Dep. at 42) Sergeant Richard Van Leuven of the 43rd Precinct testified at his deposition that he understood the standard to let people pass through the barricades to be "pretty liberal" and that it "just comes down to the officer's preference." (Van Leuven Dep. at 114) Officer Timothy Morley, who actually manned the barricades recalled that he received oral instructions from his supervisors informing him that he should ask drivers who they were, why they were visiting the neighborhood, and whether each had a driver's license or other form of identification. (Morley Dep. at 142) Morley said that each officer had discretion to decide what form of identification would be adequate. (*Id.* at 154)

The written procedural instructions provided to the supervisors of the Watson Avenue Special Operations were equally vague. The instructions, written by Lieutenant Kelly (Kelly Dep. at 57), and signed by Kelly for Inspector De Rienzo, instructed supervisors to inform officers manning the barricades that "area residents will be allowed to pass through the barriers, as well as delivery trucks." (Pl. Ex. H) The memorandum explained further that a driver who appeared to the officers not to have a "legitimate reason to enter" should be "instructed to utilize other routes." (*Id.*) Kelly did not provide a definition of "legitimate reason."

At no time did Kelly, De Rienzo, Gallagher, or any other officer consider submitting the plan to the NYPD legal department for an opinion on the constitutionality of the special operation. (Gallagher Dep. at 31; Kelly Dep. at 29-30) Gallagher did not believe a legal opinion was necessary because one "had been done in the past" for "Operation Pressure Point," an undercover operation designed to curb drug traffic on Manhattan's Lower East Side in the mid-1980s, and because Gallagher believed that checkpoints established to combat driving while under the influence of alcohol or other drugs passed constitutional scrutiny. (Gallagher Dep at 31-32)

Kelly testified that he did not believe the operation created a constitutional problem because the criminal activity in the neighborhood posed "an extremely serious condition," all vehicles were stopped, there was a minimal "level of inconvenience" to drivers, and the operation was to be conducted fewer than 18 hours a week. (Kelly Dep. at 29) In his declaration, Kelly used more formal, and legally resonant words. According to Kelly, the plan was "reasonable and constitutional" because it "contained explicit, neutral limitations on the conduct of individual officers participating in the operation." (Kelly Decl. ¶ 17) No officers had discretion to search vehicles or "to conduct actual, physical searches of persons or automobiles if they suspected drugs or guns were present." (*Id.*) Their task was limited to "determine whether passing cars belonged to neighborhood residents and if not to turn [them] away." (*Id.*) Despite the lack of posted signs or other advance notice of the approaching barricades (Kelly Dep. at 61-62), Kelly believed the roadblocks were "clearly visible" and that drivers in the area could "readily observ[e] that all cars were uniformly stopped." Further, the stops lasted no more than a few minutes, and the checkpoint caused no significant traffic congestion. Kelly concluded that the plan was the "outcome of a proper balancing of the public's interest in ending an outbreak of drive-by shootings in a known drug market with individual privacy interests." (Kelly Decl. ¶ 26)

From August 1 to August 25, 1992, the day before the operation began, an additional drive-by shooting occurred on Watson Avenue between Ward and Boynton Avenues, and other criminal activity continued at the same or lower rates than in previous months. (Defs. Ex. C) For example, there were on average 27 robbery complaints per month from May through July 1992, but there were only 13 robbery complaints filed from August 1 to August 25, 1992.[1] (*Id.*) Complaints for

---

[1] In Kelly's declaration, he alleges that there were 33 robberies in August 1992. No effort is made to explain the difference between the number of robberies reported in Exhibit C and the number reported in Kelly's declaration.

drug offenses and assaults during August, however, were roughly the same as they had been in July. Defendants did not submit any comparable records of criminal activity in the neighborhood before May 1992, or after the Special Operation concluded. Rather than submitting the same summary of complaints they did for the months of May through August, defendants have offered detective assignment sheets that allegedly show a decline in robberies during the months of September and October 1992. Lieutenant Kelly declares that this alleged "substantial drop in crime" is "directly attributable to the Watson Avenue Special Operation." (Kelly Decl. ¶ 24) Defendants offer also the declarations of four Community Council members who claim that the Special Operation "brought relief" from the drug trade and drive-by shootings. (Lebron Decl. ¶ 5; C. Green Decl. ¶ 6, G. Green Decl. ¶ 6; Mesisca Decl. ¶ 6)

Plaintiff's first 11 claims, which are the subject of this motion and cross-motion for summary judgment, seek injunctive and declaratory relief and money damages for defendants' allegedly unconstitutional acts committed pursuant to the Watson Avenue Special Operation. The first four claims seek injunctive relief. The First claim asserts that the checkpoint constituted an "unreasonable seizure" in violation of the Fourth Amendment. (Complt. ¶ 56) The Second claim alleges that the checkpoint program was an "unreasonable intrusion into plaintiff's rights . . . to withhold personal information from public authorities," in violation of the Ninth and Fourteenth Amendments. (*Id.* at ¶ 61) The Third claim alleges that the checkpoint violated plaintiff's "due process right" to be free from "unreasonable impediments to intrastate travel." (*Id.* at ¶ 65) These alleged "unreasonable impediments" included answering personal questions and showing identification, being stopped on a public street without probable cause and/or reasonable suspicion, and being "denied access to a barricaded public street, upon a police officer's unbridled and unchecked exercise of discretion." (*Id.* at ¶ 66) The Fourth claim asserts that defendants violated his First Amendment right to "freely associate with persons living within a barricaded zone covered by the checkpoint, and to freely associate with

persons who live in communities accessible through the zone." (*Id.* at ¶ 70) In the Fifth through Eighth claims, plaintiff seeks declaratory judgments that the checkpoint violated plaintiff's constitutional rights as described above. The Ninth through Eleventh claims seek money damages against New York City, the New York City Police Department, Lieutenant Kelly, Chief Gallagher, and Inspector Lee for their alleged violation of plaintiff's Fourth, Ninth, and First Amendment rights, as described in claims One, Three, and Four.

II.

Defendants assert that plaintiff lacks standing to seek injunctive relief. Plaintiff's complaint alleges that unless an injunction is granted, "there exists a realistic possibility" that he will again be stopped at a similar checkpoint, and again be subject to an allegedly unconstitutional encounter with the police. (Complt. ¶¶ 55, 62, 66, 71) Plaintiff argues that the Watson Avenue checkpoint was "merely part and parcel of a broader NYPD practice to allow police officers to wield unbridled discretion in various aspects of suspicionless vehicular stops." (Pl. Mem. at 64)

In *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983), the Supreme Court held that without a sufficient likelihood that plaintiff "will again be wronged in a similar way," plaintiff lacks standing to seek injunctive relief. The critical inquiry is "whether a plaintiff is 'realistically threatened by a repetition of his experience' or whether the claim is 'speculative.'" *Curtis* v. *City of New Haven*, 726 F.2d 65, 67 (2d Cir. 1984) (quoting *Lyons*, 461 U.S. at 109, 111); *see also Kolender* v. *Lawson*, 461 U.S. 352, 355 n.3 (1983) ("credible threat" of recurrence sufficient); *Robidoux* v. *Celani*, 987 F.2d 931, 938 (2d Cir. 1993) (standard met where there is a "substantial likelihood that he or she will again be subjected to the allegedly unlawful policy in the future); *Watson* v. *Dowling*, No. 93 Civ. 5839, 1994 WL 319295, at *2 (S.D.N.Y. June 29, 1994)(plaintiff not required to "demonstrate absolute certainty of future harm"). The NYPD has not used a similar checkpoint since the Watson Avenue

Special Operation ended in October 1992, and there is no evidence that one is being planned. Even if a similar checkpoint were established somewhere in New York City, the chances are slight that plaintiff would be driving one of the vehicles affected by that checkpoint. Furthermore, even if the NYPD did establish a similar checkpoint, and even if plaintiff did encounter it, he would then know that he was free to drive past the barricade, or park his car and proceed to the restricted area on foot. Such a minimal threat of recurrence falls short of the standard set by both the Supreme Court and this Circuit.

Both of the cases plaintiff cites in support of his alleged standing to bring his claims for injunctive relief actually support defendants' motion for summary judgment on this issue. In *Robidoux*, 987 F.2d at 938, the original plaintiff and each intervenor was suffering from the alleged unconstitutional act at the time the complaint was filed. And in *Watson*, 1994 WL 319295, at *2, plaintiffs were actually threatened with the same alleged constitutional abuses. Here, by contrast, plaintiff was neither stopped at the checkpoint at the time he filed his complaint, nor threatened by defendants or their agents that he would be subject to the same alleged constitutional violations in the future.

Plaintiff's first four claims seeking injunctive relief are dismissed because plaintiff lacks standing to bring them.

Claims Five through Eight ask declaratory relief for the same alleged violations underlying Claims One through Four. Although the requirements for standing to seek declaratory relief are not as strict as those for injunctive relief, *Levin* v. *Harleston*, 966 F.2d 85, 90 (2d Cir. 1992), the limited circumstances justifying a distinction between the two requirements are not present here. In *Levin*, 966 F.2d at 90, the one case where the Court found plaintiff had no standing to seek injunctive relief, but did have standing to seek declaratory relief, the Court emphasized that the sole reason it upheld plaintiff's standing was that a declaration would "clarify the relations between the parties and eliminate the legal uncertainties that gave rise to this litigation." Here, no such

circumstances exist. Granting declaratory relief would not clarify ongoing relations between the parties, eliminate future legal uncertainties, or serve any purpose other than to render an impermissible advisory opinion. *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969). Thus, although plaintiff need not show irreparable harm, he must nonetheless allege facts that "under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality." *Preiser* v. *Newkirk*, 422 U.S. 395, 402 (1975) (quotation omitted). Because plaintiff's allegations of future misconduct, as discussed above, consist of no more than mere speculation, plaintiff lacks standing also to seek declaratory relief.

Thus, defendants' motion to dismiss plaintiff's first eight claims is granted. In claims Nine through Eleven, plaintiff seeks damages based on the same alleged constitutional deprivations asserted in the preceding claims. For the reasons discussed below, defendants' motion for summary judgment on claims Ten and Eleven is granted. The motions for summary judgment of both plaintiff and defendants as to claim Nine is denied.

III.

Plaintiff's Ninth claim seeks monetary damages for defendants' alleged violation of his Fourth Amendment rights. A Fourth Amendment "seizure" occurs "when a vehicle is stopped at a checkpoint." *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 450 (1990); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556 (1976); *see also People* v. *Scott*, 63 N.Y.2d 518, 524, 483 N.Y.S.2d 649, 651 (1984) ("There is . . . no question that a roadblock or checkpoint stop is a seizure within the meaning of the Fourth Amendment"). In *Sitz*, the checkpoints at issue were located on a state highway, while those in *Martinez-Fuerte* were on a United States interstate highway. Defendants argue that those checkpoints and others found to effect a "seizure," did not permit drivers to avoid the police either because it was not possible to leave the roads before encountering the checkpoints, or because police

would pursue drivers who tried to drive away. *See Scott*, 63 N.Y.2d at 524, 483 N.Y.S.2d at 651 (police "were stationed in the area to follow and observe for possible violations any vehicle that avoided the roadblock by making a U-turn"). Defendants reason that because drivers facing the Watson Avenue blockades allegedly were free to avoid police contact altogether by circumventing the barricaded area, or by parking outside the area and entering on foot, they were not subject to a "seizure." Under this theory, *Sitz*, *Martinez-Fuerte*, and *Scott* are all distinguishable. Defendants argue further that even if drivers did not avoid the barricades before encountering the police, the officers were instructed to inform all drivers that they "were free to turn away or to enter on foot if they did not want to answer questions about where they were going." (Kelly Decl. ¶ 19) If this, in fact, occurred, then defendants assert that because a reasonable driver would "feel free to disregard the police and go about his business," *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991) (quotation omitted), a Fourth Amendment "seizure" could not occur.

On the submitted record, it is impossible to resolve the disparity between defendants' claim that all drivers were instructed that they "were free to turn away" from the barricades, and plaintiff's assertion that he was never presented with such an option, but rather was required to produce identification immediately, without explanation. (Complt. ¶¶ 36-37) Thus, although there is no factual dispute concerning the lack of posted warnings that drivers were about to enter a police checkpoint, there is a dispute over a material issue of fact that bars summary judgment on the issue of whether a Fourth Amendment "seizure" took place.

Even if plaintiff is correct that a "seizure" took place, however, summary judgment would still be inappropriate because there are other material issues of fact in dispute concerning whether the seizure was "reasonable" under the Fourth Amendment. The reasonableness of a seizure in a setting such as checkpoints depends on a "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brown* v. *Texas*, 443

U.S. 47, 50 (1979). The balancing test involves consideration of the gravity of the drive-by shootings, drug sales, and other crimes alleged to require the checkpoint, the effectiveness of the checkpoint in curtailing these crimes, and the level of intrusion on a driver's privacy caused by the checkpoint. *See Sitz*, 496 U.S. at 448, 450-54 (applying test from *Brown* v. *Texas*).

Because the facts as currently presented relating to the second inquiry in this three-part test -- the effectiveness of the checkpoints -- are incomplete and in dispute, both plaintiff's and defendants' motions for summary judgment on plaintiff's Ninth claim must be denied. The "effectiveness" aspect of the test is meant to assess the "degree to which the seizure advances the public interest." *Sitz*, 496 U.S. at 453 (quoting *Brown*, 443 U.S. at 51). Although the Supreme Court has made clear that an in-depth statistical examination of a checkpoint's "effectiveness" is not warranted, *id.* at 454, there must be some means, beyond subjective evaluations by neighborhood residents, of measuring whether the checkpoint in question reasonably advanced the stated purpose of the checkpoint. The submitted record does not permit intelligent assessment of whether the checkpoint in question was effective in alleviating the problems it was designed to combat. For example, as discussed above on pages 7-8, defendants' statistics on criminal complaints from May through August do not match Lieutenant Kelly's declaration about the decline in robberies during the Special Operation. Although it is undisputed that no drive-by shootings occurred during the Operation, the stated purpose of the plan was not only to stop drive-by shootings, but also to reduce drug activity, and other crimes in the neighborhood. Without a fuller picture of how the checkpoint affected a broad spectrum of crime, the proper balancing test cannot be performed. Only after such evidence is presented at trial can a factual determination be made, and the test be applied properly. Until then, and until the threshold question of whether a "seizure" actually took place is resolved, it is impossible to decide whether this checkpoint, intended to stop drive-by shootings, and reduce criminal activity generally, can pass constitutional muster. Thus,

plaintiff's and defendants' motions for summary judgment on plaintiff's Ninth claim seeking money damages for the alleged Fourth Amendment violation, are denied.

IV.

Plaintiff's Tenth claim seeks damages for the checkpoint alleged violation of his constitutional right to intrastate travel. Although the Supreme Court has declined to consider whether to draw a constitutional distinction between interstate and intrastate travel, *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 255-56 (1974), this Circuit has found a constitutional right to intrastate travel. *Spencer* v. *Casavilla*, 903 F.2d 171, 174 (2d Cir. 1990); *King* v. *New Rochelle Municipal Hous.* Auth., 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971). That right, however, is not absolute. A government intrusion on the right to travel will be upheld if the intrusion is deemed "necessary to promote a compelling governmental interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). At the very least, "governmental restrictions upon freedom to travel are to be weighed against the necessity advanced to justify them, and a restriction that burdens the right to travel too broadly and indiscriminately cannot be sustained." United *States* v. *Davis*, 482 F.2d 893, 913 (9th Cir. 1971) (citing *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508 (1964)).

There is no question that one of the basic purposes of government is to secure domestic tranquility, U.S. Const. pmbl., which includes keeping public streets free from criminal activity such as drive-by shootings. Defendants have demonstrated that the neighborhood affected by the checkpoint was plagued by robberies, drug sales, murders, and other crimes, and that the purpose of the checkpoint was to alleviate these urban ills. Defendants have shown also that the barricades affected a limited area, and that all persons were free to pass through the barricades on foot.

In cases where courts have found a constitutional violation, the government-imposed restriction was significantly greater than the one at issue here. *See, e.g., Attorney Gen'l of New York* v. *Soto-Lopez*, 476 U.S. 898, 908-909 (1986) (civil

service preference given to New York residents); *Shapiro*, 394 U.S. at 623 (residency requirements for receiving public benefits); *Aptheker*, 378 U.S. at 502-03 (prohibition on right of "subversives" to travel abroad); *King*, 442 F. 2d at 647 (residency requirements for public housing). The one case where a trial court found the constitutional right to travel implicated in a police roadblock, *State of New Jersey* v. *Barcia*, 228 N.J. Super 267, 549 A.2d 491, 497 (N.J. Super., Bergen Cty., 1988), *aff'd*, 235 N.J. Super. 311, 320, 562 A.2d 246 (N.J.Super.A.D. 1989), not only was found on appeal to have mistakenly applied the constitutional analysis, 235 N.J. Super. at 320, 562 A.2d at 250-52, but also is distinguishable from the facts presented here. In *Barcia*, the sobriety and drug checkpoint was set up on the New Jersey side of the George Washington bridge, and tied up one million vehicles for four hours. 228 N.J. Super at 280, 549 A.2d at 497. Further, the Court found no connection between the checkpoint, and the target drug market in Washington Heights, New York. *Id.* at 283, 549 A.2d at 498. Here, the checkpoint had no such effect on traffic, and the barricades were set up directly around the target neighborhood. Under these circumstances, it cannot be said that the checkpoint violated plaintiff's constitutional right to intrastate travel, and therefore defendants' motion for summary judgment on plaintiff's Tenth claim is granted.

V.

Plaintiff's Eleventh claim seeks damages for the alleged violation of his First Amendment right to associate freely with persons living within the barricaded zone, and with persons living in communities accessible through the zone. The Supreme Court has extended constitutional protection to freedom of association in "two distinct senses." *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*, 481 U.S. 537, 544 (1987) (citing *Roberts* v. *United States Jaycees*, 468 U.S. 609, 617-20 (1984)). First, the Constitution protects against unjustified government interference with a person's choice to enter into and maintain certain intimate human relationships such as marriage, the raising and educating of children, and living with relatives. *Id.* at 545. Second, the

Constitution guarantees freedom to associate for the purpose of engaging in protected speech or religious activities. *Id.* at 544.

The checkpoint at issue does not infringe directly on either of these two categories of freedom of association. However, reading the complaint generously, it alleges impact on plaintiff's right to be free from government interference with his choice to maintain certain intimate human relationships. It is hard to imagine, however, how a temporary checkpoint, which allowed all pedestrians to proceed into the barricaded area, and which permitted all drivers who lived in the neighborhood to proceed, implicates at all plaintiff's or others' freedom of association. Plaintiff's contention that the checkpoint interfered with his right to associate with persons living in communities "accessible through the zone" is just silly. The barricades did not prevent vehicles from driving a few extra blocks to reach neighborhoods beyond the area immediately affected by the checkpoint. Plaintiff fails to cite one case which supports his contention that a police checkpoint compromises a person's associational rights. The three cases plaintiff does cite do not support his claim: *Dawson* v. *Delaware*, 112 S. Ct. 1093 (1992), involved the admission into evidence of a defendant's membership in the Aryan Brotherhood; *National Ass'n for Advancement of Colored People* v. *State of Alabama*, 357 U.S. 449, 60-61 (1958), discussed the right of the National Association for the Advancement of Colored People to withhold the names of its members; and *United States* v. *Rubio*, 727 F.2d 786, 791 (9th Cir. 1983), held that the First Amendment protected defendants' rights to associate with the Hell's Angels Motorcycle Club. Plaintiff's motion for summary judgment on his eleventh claim therefore is denied, and defendants' motion is granted.

VI.

Defendants argue that Police Commissioner Bratton, Lieutenant Kelly, Inspector Lee and Chief Thomas Gallagher are entitled to qualified immunity for their alleged violation of plaintiff's right to be free from unconstitutional seizures.

Public officials are entitled to qualified immunity from liability for civil damages if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Mozzochi* v. *Borden*, 959 F.2d 1174, 1177 (2d Cir. 1992); *Jermosen* v. *Smith*, 945 F.2d 547, 550 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1565 (1992). This Circuit considers three factors to determine whether a particular right was clearly established at the time defendants acted: 1) whether the right in question was defined with "reasonable specificity"; 2) whether the decisional law of the Supreme Court and the applicable circuit court support the existence of the right in question; and 3) whether under preexisting law, a reasonable defendant official would have understood that his acts were unlawful. *Jermosen*, 945 F.2d at 550. As a threshold matter, a court must determine whether the alleged conduct violated any constitutional right. *See Mozzochi*, 959 F.2d at 1179 ("Conduct that does not violate any constitutional right certainly does not violate a constitutional right that was 'clearly established' at the time the conduct occurred") (citing *Siegert* v. *Gilley*, 111 S. Ct. 1789, 1793 (1991)). Because one of plaintiff's constitutional claims must proceed to trial, it cannot be determined at this stage whether plaintiff suffered any violation of his constitutional rights. Further, if plaintiff's version of the facts proves true, and the officers did not provide adequate instructions on how to operate the checkpoints, qualified immunity would not protect them. Therefore, summary judgment for both plaintiff and defendants must be denied, and the issue of qualified immunity also must proceed to trial.

* * *

In sum, plaintiff lacks standing to bring his first eight claims for injunctive and declaratory relief, and those claims are dismissed. Plaintiff's motion for summary judgment on the remaining counts seeking monetary damages is denied. Defendants' motion for summary judgment on plaintiff's Tenth and Eleventh claims is granted. This leaves the Ninth claim, and plaintiff's remaining constitutional and state law

claims which were not the subject of these motions, to be resolved at trial.

SO ORDERED:

/s/ Michael B. Mukasey

Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
April 25, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

MANDATE

GEORGE LANGE III
CLERK

NYNY 93-cv-5834
MUKASEY

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of December, one thousand nine hundred and ninety-six.

PRESENT: HON. James L. Oakes
HON. Ralph K. Winter
HON. John M. Walker, Jr.

Circuit Judges

UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT
FILED DEC 17 1996
GEORGE LANGE III, CLERK

Docket No: 95-7464

WINFRED L. MAXWELL,

Plaintiff-Appellee,

v.

CITY OF NEW YORK; THE NEW YORK CITY POLICE DEPARTMENT; TIMOTHY MORLEY, Police Officer; ANGEL DEJESUS, Police Officer; MONSERRATE BADILLO, Police Officer; DAVIE ARROYO, Police Officer; DANIEL GONIN, Police Sergeant; RICHARD VAN LEUVEN, Police Sergeant; and GEORGE VASTA, Police Detective,

Defendants,

WILLIAM BRATTON, as Police Commissioner of the New York City Police Department; THOMAS KELLY, Police Lieutenant; PHILIP LEE, Police Inspector; and THOMAS GALLAGHER, Police Chief,

Defendants-Appellants.

Appeal from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the order of said district court be and it hereby is reversed in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk
By:

/s/ Beth J. Meador

Beth J. Meador
Administrative Attorney

A TRUE COPY
GEORGE LANGE III, CLERK
/s/ George Lange III

ISSUED AS MANDATE.
MAR 6 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of February, one thousand nine hundred and ninety-seven.

Maxwell

Plaintiff-Appellee,

v

City of New York, et al.

Defendants-Appellants.

UNITED STATES COURT
OF APPEALS
SECOND CIRCUIT
FILED FEB 26 1997
GEORGE LANGE III, CLERK

Dkt No: 95-7464

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee Winfred L. Maxwell.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: /s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

p o ccc
inbancdn_frm

Supreme Court, U.S.
FILED
JUN 20 1997
CLERK

No. 96-1871

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WINFRED L. MAXWELL,

Petitioner,

- against -

WILLIAM BRATTON as Police Commissioner of the New York City Police Department, Police Lieutenant THOMAS KELLY, Police Inspector PHILIP LEE, Police Chief THOMAS GALLAGHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
ELAINE R. WITKOFF,
of Counsel.

PAUL A. CROTTY,
Corporation Counsel
of the City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-1036 or 1067

*Attorney of Record
June 11, 1997

34 pp

COUNTER-QUESTION PRESENTED

Whether the Court of Appeals, consistent with the three-pronged analysis used to assess the reasonableness of a suspicionless police stop, properly found the Special Operation, a temporary checkpoint encompassing an eight square-block area, to be constitutional, where the checkpoint, devised primarily to deter drive-by shootings that had recently plagued the area served an important public concern, the checkpoint was reasonably viewed by respondents as an effective mechanism and it was undisputed that during its six-week operation no drive-by shootings occurred, and the intended level of intrusion to motorists was minimal in that the stop was brief and aimed solely at ascertaining the motorist's connection to the neighborhood?

TABLE OF CONTENTS

	Page
COUNTER-QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF CASE	1
OPINIONS BELOW	9
REASONS FOR DENYING THE WRIT OF CERTIORARI	
The Court of Appeals properly granted summary judgment to respondents on the basis of qualified immunity. The Special Operation passed constitutional muster under the three-pronged analysis set forth by this Court in Brown v. Texas, 443 U.S. 47 (1979) and found applicable to checkpoints in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) . . .	14
CONCLUSION	28

TABLE OF AUTHORITIES

CASES:	Pages
Anderson v. Creighton, 483 U.S. 635 (1987) . .	26
Brown v. Texas, 443 U.S. 47 (1979)	10, 12-15, 20, 26-28
Chandler v. Miller, __ U.S. __, 117 S. Ct. 1295 (1997)	15, 16
Delaware v. Prouse, 440 U.S. 648 (1979)	20, 21
Francis v. Coughlin, 891 F.2d 43 (2d Cir. 1989) . . .	26
Hunter v. Bryant, 502 U.S. 224 (1991)	25
Malley v. Briggs, 475 U.S. 335 (1986)	26
Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990)	10, 12-17, 19, 22, 27, 28
Molinelli v. Tucker, 901 F.2d 13 (2d Cir. 1990) .	25

Mozzochi v. Borden, 959 F.2d 1174 (2d Cir. 1992) 26

Musso v. Hourigan, 836 F.2d 736 (2d Cir. 1988) 26

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 15

Prue v. City of Syracuse, 26 F.3d 14 (2d Cir. 1994) 25

Security and Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187 (2d Cir. 1984) 25

Shankle v. Texas City, 885 F. Supp. 996 (S.D. Texas 1995) 25

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 15

United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976) . 21, 22

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 13, 15-17, 22, 27, 28

Veronia School District 47J v. Acton, __ U.S. __,
115 S. Ct. 2386 (1995) 15

Whalen v. County of Fulton,
19 F.3d 828 (2d Cir. 1994), cert. denied,
513 U.S. 1076 (1995) 25

Wilkinson v. Forst, 832 F.2d 1330 (2d Cir. 1987),
cert. denied, 485 U.S. 1034 (1988) 25

Ying Jing Gan v. The City of New York,
996 F.2d 522 (2d Cir. 1993) 25, 26

Constitutional and Statutory Provisions:

United States Constitution, Fourth Amendment . . passim

United States Constitution, First Amendment . . 2, 9, 18

42 U.S.C § 1983 1

42 U.S.C. § 1985(3) 1

42 U.S.C. § 1986 1

Fed. R. Civ. P. 56 2

No. 96-1871

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WINFRED L. MAXWELL,

Petitioner,

- against -

WILLIAM BRATTON as Police Commissioner of the New York City Police Department, Police Lieutenant THOMAS KELLY, Police Inspector PHILIP LEE, Police Chief THOMAS GALLAGHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Winfred L. Maxwell ("petitioner"), commenced this action for alleged violations of his civil rights under 42 U.S.C. §§ 1983, 1985(3) and 1986, and for alleged violations of state law, arising from his encounter with officers at a vehicle checkpoint that was implemented to reduce drive-by shootings and other serious crimes in the Soundview

neighborhood of the Bronx (A 22-102).[1] Respondents Police Commissioner William Bratton, Police Lieutenant Thomas Kelly, Police Inspector Philip Lee, and Police Chief Thomas Gallagher, collectively the "respondents," together with the City of New York and The New York City Police Department (collectively, the "municipal defendants"), moved for partial summary judgment on petitioner's first eleven claims pursuant to Fed. R. Civ. P. 56, seeking injunctive and declaratory relief and money damages for the municipal defendants' allegedly unconstitutional acts committed in connection with this checkpoint operation (A 13-102, 110-722). Petitioner also moved for partial summary judgment on his first eleven claims (A 854-948). By Opinion and Order (one paper), dated April 25, 1995, the United States District Court for the Southern District of New York (Mukasey, J.), denied petitioner's cross-motion for summary judgment, granted the municipal defendants' motion for summary judgment to the extent that it dismissed petitioner's first eight claims for injunctive and declaratory relief for lack of standing, dismissed petitioner's Tenth Claim on the ground that the checkpoint did not violate petitioner's constitutional right to intrastate travel, and dismissed petitioner's Eleventh Claim on the ground that the checkpoint did not violate petitioner's First Amendment right of freedom of association (See Appendix annexed to Petition For Writ Of Certiorari ("App."), A-19, 24-27, 30-32). The District Court, however, declined to dismiss petitioner's Ninth Claim seeking money damages for his alleged unlawful seizure at the checkpoint (App. A-27-30).

---

[1] Unless otherwise indicated, numbers in parentheses preceded by the letter "A" refer to pages of the Joint Appendix submitted to the Court of Appeals for the Second Circuit.

Thereafter, the municipal defendants filed a notice of appeal taking an appeal "as of right" from the District Court's denial of their motion for summary judgment (A 1167-1169).

Petitioner seeks to have this Court review by way of certiorari an order of the United States Court of Appeals for the Second Circuit, entered December 17, 1996, which, in a two-to-one decision, reversed the District Court's order and granted the respondents' motion for summary judgment based on qualified immunity, having determined that the checkpoint as planned, was constitutional.

STATEMENT OF FACTS

Between May and July of 1992, street crime, including drive-by shootings, escalated in the Soundview neighborhood of the Bronx (App. A-3, 19-20; A 115-116).[2] In response to urging by members of the neighborhood Community Council to stem this ongoing epidemic of drive-by shootings and other serious crimes, the Watson Avenue Special Operation ("the Special Operation"), was developed and approved, wherein temporary street barricades were to be set up to prevent traffic,

---

[2] On May 3, 1992, a car drove past the corner of Watson and Ward Avenues in the Soundview section of the Bronx, and passengers armed with automatic weapons opened fire, killing one pedestrian and wounding seven others; on May 27, 1992, police arrested three heavily armed people in a car whom they believed were on their way to commit a drive-by shooting in the same area; less than one month later, a drive-by shooting at the corner of Manor and Watson Avenues claimed the life of one person, and critically injured two others; and on July 18, 1992, drive-by shooters killed another person near Wheeler Avenue (App. A-19-20; A 115-16).

other than from "'area residents and commercial vehicles,' from entering" the eight square-block narcotics-ridden area where most of the drive-by shootings had occurred (App. A-3, 20; A 117-118, 595-600, 631, 635, 639-640, 643). The checkpoint was to be active three days a week on a random basis and for approximately six hours a day, primarily in the evening hours (App. A-3-4; A 118-120). The stated purpose was to reduce drug activity, street robberies, and most importantly, eliminate drive-by shootings (App. A-20-21; A 923-924, 926). It was hoped that by conducting this operation, "'the basis of the relationship between dealer and buyer -- dependability of supply in terms of place and time of availability -- will break down and both will abandon the area'" (App. A-20-21; A 598).

Respondent Lieutenant Kelly testified at his deposition that all vehicles were to be stopped and their drivers asked to show their licenses (App. A-21; A 1095). If the address on the license did not match an address in the barricaded area, the officers manning the barricades had discretion to request other documentary proof to ascertain whether the driver lived in the area (App. A-21; A 1096). Even if a driver failed to provide such proof, the officer had discretion to let the vehicle pass if the driver provided a "reasonable explanation" for traveling into the area, or if the passengers did not fit a profile of a drive-by shooter (App. A-21; A 1097-1107). "Thus, a delivery truck, a car full of children, a vehicle driven by a local store owner, or a car dropping off visitors to the Green Pastures Church might be allowed to pass through the barricade even if the driver lacked adequate documentary proof that he lived in the neighborhood" (App. A-21; A 1099-1107). "Even passengers in a car fitting a description of drive-by shooters might be allowed to pass if the driver said he was visiting a friend in the area, and could provide his friend's

correct address" (App. A-21, A 1110). "Drivers who wished to avoid the police interrogation could drive around the area blocked by the barriers, or park their cars outside the barriers, and proceed on foot" (App. A-21; A 121).

These instructions were alleged to be provided orally to the officers who manned the barricades, but Lieutenant Kelly never put them in writing (App. A-21-22; A 894, 897, 1107). According to the District Court, Police Chief Gallagher, who approved the plan, stated that he knew of no effort to make the officers at the barricades aware of proper procedures (App. A-22; A 687).[3] Sergeant Richard Van Leuven testified at his deposition that it was his understanding that the standard for allowing motorists to pass was "'pretty liberal'" and that where the situation required that a judgment call be made by the officer manning the barricade, it "'just comes down to the officer's preference'" (App. A-22; A 885-888). Officer Morley, who actually manned the barricades, testified that he received oral instructions from his supervisors informing him that he should ask the drivers to identify themselves, to state why they were visiting the neighborhood, and to show a driver's license or other form of identification (App. A-22; A 897-898). Officer Morley said that each officer had discretion to decide what form of identification would be adequate (App. A-22; A 905).

---

[3] At his deposition, Police Chief Gallagher actually testified that the officers at the checkpoint were part of a closely supervised detail that reported to the station house where they were given instructions before leaving, but that he himself did not make any efforts to ensure that the Police Department procedure was implemented properly (A 687).

The written procedural instructions provided to the supervisors of the Special Operation, written by Lieutenant Kelly, dated August 24, 1992, instructed the detail supervisors to inform officers manning the barricades that "'area residents will be allowed to pass through the barriers, as well as delivery trucks'" (App. A-22; A 923). The memorandum explained further that a driver who appeared to the officers not to have a "'legitimate reason to enter' should be 'instructed to utilize other routes'" (App. A-22; A 923).

At no time did Lieutenant Kelly, Deputy Chief DeRienzo, Police Chief Gallagher or any other officer consider submitting the plan to the legal department for an opinion on the constitutionality of the operation (App. A-22; A 676, 1094-1095). Police Chief Gallagher did not believe a legal opinion was needed because one "'had been done in the past'" with approval of the Legal Bureau for "'Operation Pressure Point'," an undercover operation designed to curb drug traffic on Manhattan's Lower East Side in the mid-1980's, and because he believed that checkpoints established to combat driving while under the influence of alcohol or other drugs passed constitutional scrutiny (App. A-22; A 676-677).

Lieutenant Kelly testified that he did not believe the operation created a constitutional problem because they had an "'extremely serious condition', all vehicles were stopped,[4] there was a minimal 'level of inconvenience' to drivers, and the operation was to be conducted fewer than 18 hours a week" (App. A-23; A 1094-1095). According to Lieutenant

---

[4] Lieutenant Kelly stated at his deposition that because all vehicles were stopped, therefore eliminating the arbitrary stop, he, Inspector Lee and Deputy Inspector DeRienzo believed the plan was constitutional (A 1094).

Kelly, no officers had discretion to search vehicles or "'to conduct actual, physical searches of persons or automobiles if they suspected drugs or guns were present'" (App. A-23; A 121). Their task was limited to "'determine whether passing cars belonged to neighborhood residents and if not to turn [them] away'" (App. A-23; A 121). "Despite the lack of posted signs or other advance notice of the approaching barricades [App. A-23; A 1126-1127], [Lieutenant] Kelly believed the roadblocks were 'clearly visible' and that drivers in the area could 'readily observ[e] that all cars were uniformly stopped'" (App. A-23; A 122-123).[5] "Further, the stops lasted no more than a few minutes, and the checkpoint caused no significant traffic congestion" (App. A-23; A 122).

The Special Operation was in effect for six weeks, between August 26 and October 10, 1992 (A 120). "From August 1 to August 25, 1992, the day before the operation began, an additional drive-by shooting occurred on Watson Avenue between Ward and Boynton Avenues, and other criminal activity continued at the same or lower rates than in previous months (App. A-23; A 573-593). From May through July 1992, there were an average of 27 robbery complaints per month, but only 13 robbery complaints filed from August 1 to August 25, 1992 (App. A-23; A 573-593). The District Court noted, however, that in Lieutenant Kelly's declaration, he alleges that there were 33 robberies in August 1992 (App. A-23; A 123). "Complaints for drug offenses and assaults during August, however, were roughly the same as they had been in July" (App. A-23-24). Detective assignment sheets allegedly show a decline in robberies during the months of September and October 1992 (App. A-24). According to Lieutenant

---

[5] According to Lieutenant Kelly, the "road was blocked off with bright blue barricades ..." (A 122).

Kelly, "this alleged 'substantial drop in crime' is 'directly attributable to the Watson Avenue Special Operation'" (App. A-24; A 123). According to the declarations of four Community Council members, the Special Operation "'brought relief' from the drug trade and drive-by shootings" (App. A-24; A 632, 636, 640, 644).

In his Second Amended Complaint, of which only the first 11 claims were the subject of the municipal defendants' summary judgment motion, petitioner, in relevant part, sought injunctive and declaratory relief and money damages for the municipal defendants' allegedly unconstitutional acts committed in connection with the Special Operation (A 22-49). In his first four claims, petitioner seeks to enjoin the use of checkpoints similar to the one at issue, asserting that the continued utilization of such checkpoints would constitute: an unreasonable seizure under the Fourth Amendment, in that, inter alia, "the police officer manning the checkpoint would possess unbridled discretion to deny petitioner entry into the barricaded zone" (A 35-37); an unreasonable public intrusion in that petitioner will be asked questions concerning his purpose for entering the barricaded street (A 38-39); a violation of his right to be free from unreasonable impediments to intrastate travel, such as 1) having to answer intrusive questions of a personal nature, and having to show identification in order to drive onto a public street and 2) the possibility of being denied access to a barricaded public street, "upon a police officer's unbridled and unchecked exercise of discretion" (A 39-40); and a violation of petitioner's right to free association (A 41). In petitioner's fifth through eighth claims, he seeks declaratory judgments that the checkpoint violated petitioner's constitutional rights as described in claims one through four (A 42-44). In petitioner's Ninth Claim he seeks, inter alia, money damages against respondents Kelly,

Gallagher and Lee, and Police Officer Morley, for their alleged violation of his allegedly unconstitutional seizure at the checkpoint, under the Fourth Amendment (A 44-45). In petitioner's tenth and eleventh claims, he seeks money damages for the alleged violation of his right to travel intrastate (A 46-47) and his right of freedom of association (A 47-49).

OPINIONS BELOW

(a)

The District Court Opinion

The District Court denied petitioner's cross-motion for summary judgment, granted the municipal defendants' motion for summary judgment to the extent that it dismissed petitioner's first eight claims for injunctive and declaratory relief for lack of standing, dismissed petitioner's Tenth Claim on the ground that the checkpoint did not violate petitioner's constitutional right to intrastate travel, and dismissed petitioner's Eleventh Claim on the ground that the checkpoint did not violate petitioner's First Amendment right of freedom of association (App. A-19, 24-27, 30-32). The District Court, however, declined to dismiss petitioner's Ninth Claim seeking money damages for his alleged unlawful seizure at the checkpoint (App. A-27-30). The Court determined that because there was a "disparity between [the municipal] defendants' claim that all drivers were instructed that they 'were free to turn away' from the barricades, and [petitioner's] assertion that he was never presented with such an option, but rather was required to produce identification immediately, without explanation," summary judgment as to whether a Fourth Amendment seizure occurred was barred (App. A-28).

The Court further determined that even if a seizure had taken place, there was a material issue of fact as to whether the seizure was reasonable under the Fourth Amendment (App. A-28). In reaching this determination, the District Court applied the three-part balancing test applied in Brown v. Texas, 443 U.S. 47 (1979) and used in Michigan Department of State Police v. Sitz, 496 U.S. 444, 450-54 (1990) (App. A-28-29). According to the Court, "[t]he balancing test involves consideration of the gravity of the drive-by shootings, drug sales, and other crimes alleged to require the checkpoint, the effectiveness of the checkpoint in curtailing these crimes, and the level of intrusion on a driver's privacy caused by the checkpoint" (App. A-29). The District Court found, with respect to the second part of the test, that the facts establishing the effectiveness of the checkpoint, i.e., whether the checkpoint reasonably advanced its stated goals, were incomplete and in dispute, notwithstanding that there were no drive-by shootings, the primary target of the operation, while it was in effect, and ruled that only after a fuller presentation of the evidence at trial, could the Court apply the test and determine whether the checkpoint passed constitutional muster (App. A-29). Accordingly, the Court denied petitioner's and the municipal defendants' motions for summary judgment on petitioner's Ninth Claim for the alleged Fourth Amendment violation (App. A-29-30).

In denying respondents' claim that they are "entitled to qualified immunity for their alleged violation of petitioner's right to be free from unconstitutional seizures," the District Court, quoting case law from this Court and the Court of Appeals for the Second Circuit, acknowledged that "Public officials are entitled to qualified immunity from liability for civil damages if their 'conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known'" (App. A-32-33). The Court, however, applied the following analysis (App. A-33):

> As a threshold matter, a court must determine whether the alleged conduct violated any constitutional right. ... Because one of [petitioner's] constitutional claims must proceed to trial, it cannot be determined at this stage whether [petitioner] suffered any violation of his constitutional rights. Further, if [petitioner's] version of the facts proves true, and the officers did not provide adequate instructions on how to operate the checkpoints,[6] qualified immunity would not

---

[6] According to petitioner's version of the facts as set forth in his Memorandum of Law submitted in support of his cross-motion for partial summary judgment (A 959-976) and Rule 3(g) statement (A 1025-1038), all motorists seeking access to the barricaded area would encounter a manned police barricade (A 963-964, 1028). The documents describing the operation provided that "[a]rea residents and commercial vehicles will be allowed to enter the target area...;" "[t]hose individuals who do not appear to have a legitimate reason to enter will be instructed to utilize other routes. Vehicular traffic only" (A 964-965, 1028-1029). According to petitioner, the deposition testimonies of Lieutenant Kelly, Chief Gallagher, Officer Morley, and Sergeants Gonin and Van Leuven show that whether the motorist provided a legitimate reason to enter was a subjective determination to be made by the officers manning the barricade based on the individual officer's judgment and discretion depending on the circumstances presented (A 965-976, 1029-1038).

protect them. Therefore, ... the issue of qualified immunity also must proceed to trial.

(b)

The Opinion of the Court of Appeals

The Court of Appeals for the Second Circuit, in a two-to-one decision, reversed the denial of qualified immunity, holding that "establishing the particular vehicle checkpoint without more did not violate [petitioner's] Fourth Amendment rights ..." (App. A-3). The majority, finding that a Fourth Amendment seizure occurs when a vehicle is stopped at a checkpoint, applied the three-pronged test set forth in Brown v. Texas, 443 U.S. 47, 50-51 (1979) and applied in Michigan Department of State Police v. Sitz, 496 U.S. 444, 448-49 (1990) ("Sitz"), in assessing the reasonableness of the seizure (App. A-6-7). This included balancing "(i) the gravity of the public concerns served by the checkpoint; (ii) the degree to which the checkpoint effectively addresses those concerns; and (iii) the severity of the intrusion upon individual liberty" (App. A-7). Under this analysis, the Court of Appeals determined first, that the checkpoints "served an important public concern in attempting to deter drive-by shootings that were, or were reasonably perceived to have been, connected with widespread drive-up drug purchases" (App. A-7). As for the second prong, the majority found that "at the time of implementation, the checkpoints were reasonably viewed as an effective mechanism to deter criminal behavior in the barricaded area," noting that "checkpoints similar to the one here had been effectively used in the past by the New York City Police," and adding that "in order to satisfy the effectiveness prong, a checkpoint need only be one reasonable method of deterring

the prohibited conduct; it need not be the most effective method," citing Sitz, 496 U.S. at 453-54 (App. A-7).

As to the third prong, the majority, in reliance on United States v. Martinez-Fuerte, 428 U.S. 543 (1976) ("Martinez-Fuerte") and Sitz, supra, 496 U.S. 444, found that "the intended level of intrusion to motorists was minimal," noting that "[n]o vehicle was to be stopped or its operation questioned unless entry into the cordoned-off area was desired;" that "[f]or those seeking entry, the stop was meant to be brief and was aimed solely at ascertaining the motorists' connection to the neighborhood;" and that "because the plan here was to stop all motorists seeking entry, there was little concern that the stop would generate 'fear and surprise'" (App. A-7-8).

As to petitioner's argument that the plan empowered the officers with excessive discretion to turn people away, the Court of Appeals noted that "the instructions given allowed all residents and commercial vehicles to enter, as well as persons dropping off little children or visiting the church. It is true that discretion was to govern the inevitable myriad of other circumstances that might arise, but we know of no way to catalogue each of those circumstances in advance and to provide a litmus test to resolve them. We believe that the instructions were as detailed as was reasonably possible and, therefore, were constitutionally adequate" (App. A-8-9).

In a dissenting opinion, Senior Circuit Judge Oakes agreed with the District Court that only after trial could a factual determination regarding the checkpoint's effectiveness be made and the second prong of the Brown test correctly applied, and that not until the threshold question of whether a seizure actually took place is resolved, would it be possible to

determine whether the checkpoint could pass constitutional muster (App. A-10-14). Judge Oakes agreed with petitioner's contention that entrance to the barricaded area was "left to the arbitrary determination of officers in the field with no meaningful written standards of how to exercise their discretion;" and found that "it is this unfettered discretion that makes the majority's resolution of the case, ..., totally unsound" (App. A-14-15). Judge Oakes concluded, "the decision ... goes a long way toward putting the stamp of judicial approval on overly-discretionary police practices. Unfortunately, it does so unnecessarily because here the factual record was, in a very capable district judge's view, insufficiently developed to permit coming to sound conclusions in several respects" (App. A-16).

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Court of Appeals properly granted summary judgment to respondents on the basis of qualified immunity. The Special Operation passed constitutional muster under the three-pronged analysis set forth by this Court in Brown v. Texas, 443 U.S. 47 (1979) and found applicable to checkpoints in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990).

(a)

Petitioner has not presented a compelling question to be reviewed by this Court. The Court of Appeals correctly applied the three-pronged test articulated in Brown v. Texas, 443 U.S. 47, and employed in Sitz, 496

U.S. 444, in assessing the reasonableness of the checkpoint in issue. In Brown, this Court held that consideration of the reasonableness of a seizure that is less intrusive than an arrest, "involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." 443 U.S. at 50-51. Petitioner seeks to overturn the decision of the Court of Appeals by arguing that the relevant authorities in assessing the reasonableness of the suspicionless stop here at issue are Chandler v. Miller, __ U.S. __, 117 S. Ct. 1295 (1997); Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989); Veronia School District 47J v. Acton, __ U.S.__, 115 S. Ct. 2386 (1995); and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), which require the demonstration of "special needs 'beyond the normal need for law enforcement'" to permit suspicionless searches and seizures (See Petition For Writ Of Certiorari ("Pet."), 14).[7] Petitioner seeks to eschew the balancing test used in Sitz, and asserts that this Court upheld the constitutionality of the stops at issue in Martinez-Fuerte and Sitz "based upon the presence of 'special needs' coupled with the existence of neutral, objective standards which ensured that the searches and seizures would be minimally intrusive" (Pet., 14). However, in Sitz, 496 U.S. at 449-50, this Court specifically rejected this "special needs" analysis and found that from a reading of the decision in National Treasury Employees Union v. Von Raab, "which cited and discussed

---

[7] None of these cases involved a checkpoint at which all motorists were stopped. Rather, these cases involved the constitutionality of suspicionless searches incident to drug testing.

with approval [the Court's] earlier decision in United States v. Martinez-Fuerte, 428 U.S. 543 ...(1976), that it was in no way designed to repudiate [the Court's] prior cases dealing with police stops of motorists on public highways. Martinez-Fuerte, ... which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and Brown v. Texas, ..., are the relevant authorities here." Indeed, this Court recently, in Chandler v. Miller, supra, __ U.S. at __, 117 S. Ct. at 1298, again cited these earlier decisions with approval.

(b)

When properly viewed under the analysis used by this Court and followed by the Court of Appeals, there is simply no merit to petitioner's assertion that the checkpoint here at issue was unconstitutional in its creation. With respect to the first prong, the Court of Appeals, having found that the Special Operation was instituted in response to a wave of street crime, including four drive-by shootings during the spring and summer of 1992, found that the checkpoints "served an important public concern in attempting to deter drive-by shootings that were, or were reasonably perceived to have been, connected with widespread drive-up drug purchases" (App. A-3, 7). It cannot be seriously disputed that the public interest in curtailing this wave of violence is equally as weighty as the interest involved in Sitz, 496 U.S. at 451, detecting drunk drivers, and in Martinez-Fuerte, 428 U.S. at 552, 556-57, detecting illegal aliens.

As for the second prong, the majority found that "at the time of implementation, the checkpoints were reasonably viewed as an effective mechanism to deter

criminal behavior in the barricaded area," noting that "checkpoints similar to the one here had been effectively used in the past by the New York City Police," and adding that "in order to satisfy the effectiveness prong, a checkpoint need only be one reasonable method of deterring the prohibited conduct; it need not be the most effective method," citing Sitz, 496 U.S. at 453-54 (App. A-7).

The Court of Appeals correctly rejected the District Court's finding that the "effectiveness" of the checkpoint required the presentation of more evidence (App. A-29). The analysis of effectiveness does not properly involve a "searching examination" of effectiveness. Sitz, 496 U.S. at 454. As noted by the District Court, "the stated primary purpose of the operation was to 'prevent drive by shootings'" (App. A-21), and concededly, "no drive-by shootings occurred during the [Special] Operation" (App. A-29). This statistic alone establishes that the Special Operation was more successful than the sobriety checkpoint at issue in Sitz, in which only 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. 496 U.S. at 454-55. Indeed, in Martinez-Fuerte, 428 U.S. 543, this Court sustained the constitutionality of two permanent immigration checkpoints (one near San Clemente, California and one near Sarita, Texas), even though no statistical information regarding the Sarita checkpoint was provided and, with respect to the checkpoint at San Clemente, the ratio of illegal aliens detected to vehicles stopped was approximately 0.5 percent (see Sitz, 496 U.S. at 455).

As to the third prong, the majority, in reliance on Martinez-Fuerte and Sitz, found that "the intended level of

intrusion to motorists was minimal," noting that "[n]o vehicle was to be stopped or its operation questioned unless entry into the cordoned-off area was desired;" that "[f]or those seeking entry, the stop was meant to be brief and was aimed solely at ascertaining the motorists' connection to the neighborhood;" and that "because the plan here was to stop all motorists seeking entry, there was little concern that the stop would generate 'fear and surprise'" (App. A-7-8). Indeed, drivers who wished to avoid the police questioning could drive around the barricaded area or park their cars outside the barriers and enter on foot (App. A-21; A 121-122). The temporary checkpoint allowed all pedestrians to proceed into the area (App. A-21; A 121-122).[8] "No officers had discretion to search vehicles or 'to conduct actual, physical searches of persons or automobiles if they suspected drugs or guns were present'" (App. A-23; A 121). "Their task was limited to 'determine whether passing cars belonged to neighborhood residents and if not

---

[8] To the extent petitioner suggests that the Court of Appeals' decision eviscerates rights to freely travel public roads "to visit friends, loved ones, or merchants, or just to pass through" (Pet., 20), the District Court determined that the checkpoint did not infringe directly on any purported right to intrastate travel (App. A-30-31); nor on his First Amendment right of freedom of association since the temporary checkpoint allowed all pedestrians to proceed into the area and permitted all drivers who lived in the neighborhood to proceed (App. A-31-32). Petitioner never sought permission to appeal from these rulings and cannot now reassert such claims.

to turn [them] away'" (App. A-23; A 121).[9] The stops lasted no longer than a few minutes, and the checkpoint caused no significant traffic congestion (App. A-23, A 122). The greatest inconvenience that could have been caused by the roadblock was that due to taking a detour of several blocks or parking one's car a couple of blocks from one's destination (A 122). As such, the objective intrusiveness to individual occupants was minimal; all that was required of a motorist was a response to brief questioning and the production of one's license or a document evidencing a relationship to the community (A-21).

Furthermore, the subjective intrusiveness -- the generating of fear or surprise on the part of travellers -- of a checkpoint is significantly ameliorated because the motorist can see that all motorists are being stopped and can see visible signs of the officers' authority. Sitz, 496 U.S. at 452-53. Here, the checkpoint was "'clearly visible'" and "drivers in the area could 'readily observ[e] that all cars were uniformly stopped'" (App. A-23; A 122-123).

As to petitioner's argument that the plan empowered the officers with excessive discretion to turn people away, the Court of Appeals noted that "the instructions given allowed all residents and commercial vehicles to enter, as well as persons dropping off little

---

[9] Since the plan only allowed for the turning away of a vehicle when no legitimate reason for entry into the area was given, the Court of Appeals properly found that this "turning away" may not constitute a search or seizure for Fourth Amendment purposes (App. A-9, n. 2).

children or visiting the church. It is true that discretion was to govern the inevitable myriad of other circumstances that might arise, but we know of no way to catalogue each of those circumstances in advance and to provide a litmus test to resolve them. We believe that the instructions were as detailed as was reasonably possible and, therefore, were constitutionally adequate" (App. A-8-9).

It is undisputed that a central concern in assessing the reasonableness of seizures that are less intrusive than an arrest is to assure that an individual's reasonable expectation of privacy not be subjected "to arbitrary invasions solely at the unfettered discretion of officers in the field." Brown v. Texas, supra, 443 U.S. at 51; Delaware v. Prouse, 440 U.S. 648, 654-55 (1979).

There is nothing in any of the relevant case law to suggest that an officer loses the basic discretion to use the training, experience and judgment as a police officer simply because he or she is manning a checkpoint stop and making inquiries within the operational confines of the checkpoint, including the ability to evaluate the veracity of those one encounters and, based on the response obtained, to turn certain people away. Without such discretion the Special Operation could have had absolutely no utility whatsoever.

This Court has clearly stated that the abuse of discretion with which it is concerned is the power to stop randomly selected vehicles in a non-uniform, standardless manner subject only to the discretion of the individual officer. In Delaware v. Prouse, supra, 440 U.S. 648, it was the randomness of the stop at issue that made it constitutionally infirm and not the inquiries made by the

officer once the stop was made. In Prouse, the Court never raised any questions concerning the "discretion" involved in asking to see a driver's license and registration. In fact, the Court took it for granted that such inquiries were legitimate if conducted in a uniform manner in which the selection of those questioned was not left to the discretion of officers in the field, 440 U.S. at 663:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.... Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.

Implicitly, since the inquiry at issue was the request to see a driver's license and registration, Prouse would appear to permit such questioning if conducted in a uniform manner not involving unfettered discretion in the selection of whom the police will question. As such, the Special Operation, in which all persons passing the roadblock were uniformly asked for the same information relevant solely to the legitimate operation of the checkpoint, did not involve any abuse of discretion.

In United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976), the Ninth Circuit had ruled that an immigration checkpoint operation under a warrant of inspection, involving the slowing down or stopping of all vehicles, and utilizing the "purely discretionary" opinion of a border patrol agent as to which cars should be dispatched to a secondary inspection area

where its occupants would be asked questions which were "personal in nature," i.e., about their citizenship and immigration status, was impermissible under the Fourth Amendment. 514 F.2d at 313, 320. In reversing, the Court rejected the challenge to the checkpoint agents' discretion in making "selective referrals" to the secondary area, noting that the border patrol agents "must have wide discretion in selecting the motorists to be diverted for the brief questioning involved." Martinez-Fuerte, 428 U.S. at 563-64.

Similarly, the post-stop discretion exercised by the officers conducting the checkpoint, the constitutionality of which was upheld, in Sitz, was at least as broad-ranging as the discretion exercised by the officers manning the Special Operation. At the sobriety checkpoint at issue in Sitz, all vehicles passing through the checkpoint were stopped and drivers were examined for signs of intoxication. 496 U.S. at 447. If a checkpoint officer detected any signs of intoxication, the motorist was directed out of the flow of traffic to a secondary questioning area where officers would check the motorist's license and car registration and, if warranted, conduct further sobriety tests. Id. The discretion involved in observing, questioning and sniffing a motorist and determining whether he or she is intoxicated is at least as broad-ranging as that required to ask for a motorist's driver's license or identification and to determine that motorist's relation to the community. The request for a driver's license or some other indicia of residence in a specific neighborhood is easily standardized and depends much less on the highly subjective observation of physical appearances than does the determination that a motorist appears to be intoxicated. The discretion necessary to ascertain whether someone has a legitimate reason to be in

a particular neighborhood cannot reasonably be said to reach the level of being an arbitrary or unfettered use of discretion, as petitioner wrongly contends.

Finally, when considering the possible constitutional implications of the discretion available to the officers manning the Special Operation, it is helpful to take into account the relatively unintrusive character of the Special Operation as distinguished from other checkpoint operations which have been found to be constitutional. Sobriety and immigration checkpoints are intended both to deter and to detect criminal activities. The Special Operation was not instituted in order to detect criminals in a dragnet operation; it was simply intended to deter drive-by shootings and to protect the public safety in the community. An officer utilizing his or her proper discretion at a sobriety checkpoint has the ability to bring the full power of the state to bear upon a person who, in his or her determination, is driving while impaired. At the very least an officer at a sobriety checkpoint retains the discretion to subject a motorist to substantial further questioning, a possible breathalyzer test, and the risk of criminal prosecution. An officer manning an immigration checkpoint retains the discretion to refer a person to a secondary questioning area in which inquiries concerning one's citizenship status can be made and a motorist might face the risk of possible criminal prosecution or banishment from the United States. Officers manning the checkpoints in connection with the Special Operation were not there for the purpose of bringing criminal or civil sanctions against the motorists they encountered -- they were granted the discretion only to determine a motorist's relation to the community and to turn away any vehicle when no legitimate reason for entry into the area was given. As

such, the discretion vested in officers manning the Special Operation allowed little potential for abuse and is consistent with that previously upheld by this Court.

In sum, respondents submit that the balance of their interest in reducing drug activity, street robberies, and most importantly eliminating drive-by shootings in the targeted area, the reasonable belief that the checkpoint would deter criminal behavior and the achievement of its primary goal of deterring drive-by shootings, and the minimal degree of intrusion upon motorists briefly stopped at manned police barricades for purposes of responding to routine questions concerning one's connection to the neighborhood, weighed in favor of the temporary operation, and was properly found to be consistent with the Fourth Amendment.

(d)

Petitioner, consequent to his argument that the Special Operation was violative of the Fourth Amendment, asks this Court to rule that the Special Operation violated "clearly established" rights at the time when it was established for purposes of vitiating respondents' qualified immunity, rather than to remand the issue back to the Court of Appeals (Pet., 23). Even assuming, arguendo, that the Special Operation was found to be unconstitutional, as planned, the preexisting law in 1992 could not possibly have led Lieutenant Kelly, Inspector Lee and Chief Gallagher, or any other reasonable police official, to conclude while establishing the Special Operation that it was unlawful. Indeed, Supreme Court, Second Circuit and New York State Court of Appeals case law in 1992 supported the constitutionality of the Special Operation, as

they do today. At most, the individual respondents operated in an area where the law "was not charted clearly." Security and Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187, 211 (2d Cir. 1984). Where the law is unclear, qualified immunity applies. See Prue v. City of Syracuse, 26 F.3d 14, 19 (2d Cir. 1994); Ying Jing Gan v. The City of New York, 996 F.2d 522, 532 (2d Cir. 1993); Molinelli v. Tucker, 901 F.2d 13, 16-17 (2d Cir. 1990). See also Wilkinson v. Forst, 832 F.2d 1330, 1341-42 (2d Cir. 1987), cert. denied, 485 U.S. 1034 (1988) (defendant commissioners were not individually liable for violating rights of Ku Klux Klan members who had been subjected to mass pat-down searches at checkpoints before entering Klan rally sites; Court found "law applicable to the unique and difficult problem presented to the defendants by these historically unprecedented Klan rallies in Connecticut [was not] so adequately clear and settled as to warrant an award of damages ..."); Shankle v. Texas City, 885 F. Supp. 996, 1006 (S.D. Texas 1995) (although the random erection and enforcement of roadblocks at the entrances to a neighborhood, ostensibly created for purposes of reducing gang-related criminal activity in the area, were held to be unconstitutional, the Court found that because "the law was not clearly established as to the Constitutionality of the type of roadblocks" erected at the time of their occurrence in the summer of 1994, the Mayor and Chief of Police were immune from suit).

To defeat an official's claim of qualified immunity, petitioner must demonstrate that the right he is asserting was clearly established at the time of the alleged violation. See Hunter v. Bryant, 502 U.S. 224, 233 (1991) (Stevens, J., dissenting); Whalen v. County of Fulton, 19 F.3d 828,

831 (2d Cir. 1994) (Walker, J., dissenting), cert. denied, 513 U.S. 1076 (1995); Ying Jing Gan v. The City of New York, supra, 996 F.2d at 534; Francis v. Coughlin, 891 F.2d 43, 46 (2d Cir. 1989); Musso v. Hourigan, 836 F.2d 736, 742 (2d Cir. 1988). As neither petitioner nor the District Court cited any case holding checkpoints of this nature to be unconstitutional, nor pointed to any cases which would have made it apparent that such an operation would be unlawful,[10] there is no merit to petitioner's contention that the existing case law put respondents on notice that the Special Operation violated the Fourth Amendment.

(e)

In this petition, petitioner asserts that the decision of the Court of Appeals should be reversed. Petitioner repudiates the District Court's finding that a further statistical analysis of whether the Special Operation reduced crime is necessary in determining the effectiveness prong of the Brown analysis (Pet., 18, n. 5). Therefore,

---

[10] As the Court of Appeals for the Second Circuit has noted, "[w]hen addressing a claim of qualified immunity, a court must take care not to pose the issue in terms that are too general or abstract." Mozzochi v. Borden, 959 F.2d 1174, 1177 (2d Cir. 1992). "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Where reasonably competent officials could disagree, immunity should be recognized. Malley v. Briggs, 475 U.S. 335, 341 (1986).

petitioner, who did not seek permission to appeal from the District Court's order and sought affirmance of that Order in his appellee's brief in the Court of Appeals, is asking this Court to grant certiorari so that he can be afforded relief which was not granted to him by either the District Court or even propounded in the dissenting opinion by Judge Oakes. Petitioner should not be given such an opportunity.

(f)

For all the above reasons, this case does not present important issues meriting review by this Court. This Court's decisions in Sitz and Martinez-Fuerte, and the three-pronged analysis of Brown v. Texas found applicable to checkpoint operations, govern the checkpoint at issue and provide ample support for the reasonableness of the Special Operation. Petitioner's contention that the checkpoints were unconstitutional is premised upon a flawed application of the appropriate balancing test. Petitioner's attempt to infuse the three-part analysis with a "special needs" component has already been soundly rejected by this Court.

Petitioner's suggestion that this case presents the Court "with an important and timely opportunity to clarify the broader question of whether blanket suspicionless vehicular stops are permissible under the Fourth Amendment for purposes of crime prevention" (Pet., 25), misapprehends the limited nature of the Special Operation. The Special Operation was instituted to serve the weighty concerns of disrupting a local drug market and putting an end to a rash of drive-by shootings in the community. It was a response that was closely tailored to address a specific situation which had spun out of control, bringing

an intolerable condition of random violence to bear upon the community. The closing of the Watson Avenue target area to non-local vehicular traffic was a logical plan to disrupt the neighborhood's drive-through drug market and prevent drive-by shootings, as one cannot commit a drive-by shooting while on foot. Petitioner's comparison to other checkpoint operations which were found wanting under the Brown analysis does not negate the lucidity of the guiding principles enunciated in Martinez-Fuerte and Sitz.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

PAUL A. CROTTY,
Corporation Counsel
of the City of New York,
Attorney for Respondents.

LEONARD J. KOERNER,*
LARRY A. SONNENSHEIN,
ELAINE R. WITKOFF,

of Counsel.

*Attorney of Record

June 11, 1997